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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Courts of Appeals are in conflict regarding preemption of State railroad walkway requirements pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 *et seq.*

2. Whether the Fifth Circuit's decision herein improperly places national uniformity of regulation over the primary goal of safety under the Federal Railroad Safety Act of 1970, resulting in a void or gap in safety regulation which cannot be filled by the State.

LIST OF ALL PARTIES

The following parties appeared before the Court of Appeals:

Plaintiff-Appellees:

Missouri Pacific Railroad Company,
Southern Pacific Transportation Company,
The Atchison, Topeka and Santa Fe Railway Company,
Burlington Northern Railroad Company,
Missouri-Kansas-Texas Railroad Company,
St. Louis-Southwestern Railway Company,
Kansas City Southern Railway Company,
Louisiana and Arkansas Railway Company.

Defendant-Appellants:

Railroad Commission of Texas, and its Commissioners:
Lena Guerrero
James E. (Jim) Nugent
Robert Krueger

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TO THE HONORABLE SUPREME COURT:

Petitioners, Railroad Commission of Texas and its Commissioners Lena Guerrero, James E. (Jim) Nugent, and Robert Krueger, appearing by and through Dan Morales, Attorney General of Texas, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued December 6, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 948 F.2d 179 (1991). The opinion of the United States District Court for the Western District of Texas, Austin Division (Appendix C) is unreported. The first opinion of the Fifth Circuit, prior to remand, (Appendix E) is reported at 833 F.2d 570 (1987).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Judgment of the court of appeals was entered on December 6, 1991.

STATUTES INVOLVED

The pertinent provision of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 is set forth in the Reasons For Granting The Petition. The Railroad Commission of Texas regulation, 16 Tex. Admin. Code § 5.619, is set forth in Appendix H.

STATEMENT OF THE CASE

The railroads originally brought this action against the Railroad Commission of Texas (the "Commission") seeking to enjoin and have held invalid a series of rail safety regulations promulgated by the Commission. The railroads complained that the state rules (1) were preempted by federal laws and regulations, (2) constituted an unconstitutional burden on interstate commerce, (3) were an unlawful exercise of power by the Commission, and (4) were arbitrary, capricious, and not supported by substantial evidence. The railroads moved for partial summary judgment on the grounds of preemption and unconstitutional burden. The Commission filed a cross

motion for summary judgment. The district court, by Amended Judgment and Memorandum Order, granted in part the railroads' motion for partial summary judgment and denied the Commission's motion solely on the ground of preemption by federal law and regulation. The Commission appealed.

The United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded one issue for trial, finding a "material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations." *Missouri Pacific Railroad Co. v. Railroad Commission*, 833 F.2d 570, 575 (5th Cir. 1987) (Appendix E) ("MOPAC I"). Accordingly, the case came before the district court on amended pleadings whereby the railroads complained only that the walkways regulation was (1) preempted, (2) an undue burden on interstate commerce, and (3) arbitrary, capricious and unsupported by substantial evidence.

The district court again ruled the State's walkway regulation preempted by federal law and regulations and dismissed as moot the railroads' remaining claims. The Fifth Circuit affirmed in the case at bar.

Statement of Facts

The Commission adopted the challenged regulation in 1986 in response to the 1985 enactment by the Texas Legislature of Tex.Rev.Civ.Stat.Ann. art 6448a (Vernon Supp. 1991), which provides:

> The Railroad Commission of Texas is hereby authorized to perform any act and issue any rules and orders as permitted by the Federal Railroad Safety Act of 1970 (45 U.S.C.A. 431, *et seq.*).

Upon proper public notice of rulemaking and receipt of public comments, the Commission promulgated the subject rail safety rule, codified at 16 Tex.Admin. Code § 5.619 (Appendix H).

Section 5.619 requires smooth, maintained, properly sloped walkways which are level with the tops of the ties along both sides of all tracks within railyards and the tracks adjacent thereto so as to provide safe areas for railroad employees to perform duties associated with those tracks.

REASONS FOR GRANTING THE PETITION

I.

THE CIRCUIT COURTS ARE IN CONFLICT CONCERNING PREEMPTION OF STATE WALKWAY REQUIREMENTS

The Fifth Circuit by its decisions in this case, has created a clear, direct conflict with the Ninth Circuit. In addition, the Sixth Circuit, in a closely related case, has reached a third resolution to the central issue. Intervention by this Honorable Court is required to end the confusion among the circuit courts.

A. The Issue - Walkways along railroad tracks.

The question, raised by railroads in each of the three jurisdictions mentioned, is whether state-enacted walkway requirements are preempted pursuant to the Federal Railroad Safety Act of 1970. 45 U.S.C. § 421 et. seq. ("FRSA"). That act provides, in part, that:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety *until such time as*

> *the Secretary has adopted* a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434. (Emphasis added).

Thus, the FRSA, should only preempt state laws or rules when the federal government has *acted* with respect to the same subject matter. It is undisputed in the case at bar that the FRSA does not occupy the entire field of railroad safety. *See also, Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983); *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037, 1041 (Penn. 1980). Under FRSA § 434, two situations permit states to regulate. First, a state may regulate railroad safety until the Secretary of Transportation adopts a rule, regulation, order, or standard covering the subject matter of the state regulation. Second, a state may regulate railroad safety even more stringently than federal regulation where it is necessary to eliminate or alleviate an essentially local safety hazard.

The Secretary of Transportation has not adopted a rule, regulation, order, or standard expressly covering the subject of walkways alongside tracks. The Circuit Courts have, however, dealt with this question in various manners.

B. The Ninth Circuit Decision

The first Circuit Court to consider walkways was the Ninth. *Southern Pacific Railroad Co. v. Public Utility Comm'n of Calif.*, 820 F.2d 1111 (9th Cir. 1987) (Appendix G, p. 64a). The court affirmed, per curiam, the well-reasoned analysis of the district court in *Southern Pacific Railroad Co. v. Public Utility Comm'n of Calif., 647 F.Supp. 1220 (N.D. Calif. Nov. 3, 1986)* (Appendix F, p. 51a). The court held that under the unambiguous terms of FRSA § 434, walkways were an important safety issue which the appropriate federal agency had not addressed. Thus, the State of California could regulate. The California rule requires proper walkways on all tracks where workers may be on the ground performing operations associated with the track.

C. The Fifth Circuit Decision

Shortly thereafter, the Fifth Circuit specifically rejected the Ninth Circuit's preemption analysis in this case concerning the Texas walkway regulation which only requires walkways in railyards and adjacent switching areas. *Missouri Pacific Railroad Co. et al. v. Railroad Commission of Texas, 833* F.2d *570* (5th Cir. 1987) (Appendix E, p. 37a). ("MOPAC I") The court characterized the Ninth Circuit's reasoning as "overly simplistic", and imposed a novel "practical", factual test to determine preemption of walkways. *Id.* at *575-576.* Under this test, the court, finding conflicting summary judgment evidence, remanded the case for a factual determination of whether the walkways rule would cause enlargement or strengthening of the track structure or otherwise interfere with other matters covered by other federal rules. *Id.* The court found neither express preemption by federal action on walkways, nor negative preemption by deliberate federal inaction.

Since the court found that the lower court had improvidently granted summary judgment on conflicting affidavits, appeal at that time was inappropriate.

The district court, following the analysis in MOPAC I, found preemption. The Fifth Circuit, in the case at bar, reaffirmed its previous decision and affirmed the lower court, finding that its view of the evidence was not clearly erroneous. *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 948 F.2d 179 (5th Cir. 1991) (Appendix A, p. 1a) ("MOPAC II").

D. The Sixth Circuit Decision

Sandwiched between MOPAC I and MOPAC II is the Sixth Circuit's holding. *Norfolk & Western Railway Company v. Public Utilities Commission of Ohio*, 926 F.2d 567 (6th Cir. 1991) (decided February 27, 1991). That case dealt with a distinct, but related issue -- walkways on railway bridges and trestles. There, the court found negative preemption by the Federal Railroad Administration's ("FRA") failure to affirmatively exercise its full authority regarding bridge walkways. *Id.* at 571. The Sixth Circuit relied, in part, on FRA statements which both the Ninth and the Fifth Circuits had rejected as showing negative preemption. *See Id.* at 570-571; MOPAC I at 575-576; *Southern Pacific*, 647 F.Supp. at 1223-1224.

These conflicts among the circuits, interpreting preemption on the same or related subjects, under the same statute, should be resolved. The issue of worker safety is nationwide in scope. Some state walkway rules are enforceable by federal decree; others, such as the Texas rule, are enjoined by federal order.

II.

THE HISTORY OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT ESTABLISHES CONGRESS'S INTENT TO CREATE A PARTNERSHIP BETWEEN FEDERAL AND STATE LAWMAKERS, IN THE PURSUIT OF RAIL SAFETY.

Section 434 of the FRSA begins with a general statement of intent to promote nationally uniform laws and standards relating to railroad safety "to the extent practicable." However, the statute goes on, in a much more specific way, to direct that states shall retain the power to regulate areas of rail safety "[u]ntil such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The language of § 434 could not be more clear regarding its intent to allow continued state involvement in the regulation of railroad safety. Indeed, the drafters' desire for national uniformity of safety laws was modified with the words "to the extent practicable," removing any doubt that the primary purpose of the FRSA was railroad safety. To read § 434's general goal of uniformity as determinative of whether a subject matter has been covered by a federal regulation, is a misinterpretation of the clear language of § 434. As such it amounts to an usurpation of the FRSA's specific goal of railroad safety by replacing it with a general desire for uniformity. The Fifth Circuit committed just such a mistake in the pending case.

As noted above, the decisions in the Fifth Circuit (Appendices A, E) when compared with the Ninth Circuit case of *Southern Pacific Transp. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd.*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*), (Appendices F, G) evidence the current split in the interpretation and application of § 434

of the FRSA. These cases also show the need for Supreme Court review to establish the appropriate inquiry for determining when the FRA may be found to have adopted a rule, regulation, order, or standard covering a particular "subject matter."[1] Such a determination is necessary to avoid costly and time consuming litigation on a case by case basis, and to assure the uniform application of § 434 nationwide. Under the FRSA, Congress specifically intended that states have the ability to regulate, within their borders, the gaps in coverage which are inherent in a nationalized regulatory scheme.

A. Congress Intended That States Have Authority To Regulate Railroad Safety Subsequent To The Passage Of The FRSA.

The language of the FRSA, its legislative history, and court decisions interpreting it, make it clear that Congress, in enacting the statute did not intend to displace state rail safety regulations absent specific federal regulatory authority.[2] The FRSA provides, *inter alia* that the Secretary of Transportation shall have jurisdiction over all areas of railroad safety. Along with the broad authority delegated to the Secretary, Congress specifically authorized

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[1] Another case holding that walkways are not preempted is *Illinois Cent. Gulf R.R. v. Tennessee Pub. Serv. Comm'n.*, 736 S.W.2d 112 (Tenn.Ct.App. 1987) (state walkway regulations not preempted by FRSA). *But see, Norfolk & Western Railway v. Public Utilities Commission of Ohio*, 727 F.Supp. 367 (S.D. Ohio 1990), *aff'd.*, 926 F.2d 567 (6th Cir. 1991) (state walkways preempted because of negative preemption); *Black v. Seaboard System R.R.*, 487 N.E.2d, 468 (Ind.Ct.App. 1986) (state standard for construction and maintenance of walkways preempted by FRSA); *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980) (allegations of muddy conditions in areas adjacent to track based upon state law claims preempted by FRSA).

[2] *See Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

state regulation of railroad safety. The FRSA, 45 U.S.C. § 434 provides that:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with an Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (underlining added).

The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. (*See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Commerce*, 90th Cong. 2d Sess. 1-6, Serial No. 90-39 (1968)). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a 'Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that "[e]xisting State

rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted"...unless the Secretary prescribed federal safety standards covering the subject matter of the particular state or local safety requirements..." (underlining added).

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

> "SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, regulations or standards."

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bills, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

> To avoid a lapse in regulation, Federal or State, after a Federal safety bill has been passed, section 105 provides that the states

> may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states. Therefore, until the Secretary has promulgated his own specific rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute....(underlining added)

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills), S. 1933, 91st Cong., 2d Sess., Ser. No. 91-51, p. 29 (1970).[3] Rep. Jake Pickle testified as follows:

> Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, the States can still take action in three methods. First, the State can continue and initiate legislation in areas of safety not covered by Federal regulations....As an important adjunct, for the first time, the States are clearly given the power to initiate legislation in areas which have not been touched by these [federal] regulations and these State legislative efforts will remain in

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[3]Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 45 U.S.C. § 434.

> effect unless and until such time that the Federal Government institutes its own regulations. This is an important advance and recognition of State governments. (underlining added).

116 Cong. Rec. 27613 (August 6, 1970).

The Senate Report provided further support for the authority of the state to regulate railroad safety:

> ...this section [105] preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter. (underlining added).

S. Rep. No. 91-619, 91st Cong., 1st Sess. pp. 8-9 (1969).

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety. (underlining added).

H.R. Rep. No. 91-114, 91st Cong., 1st Sess. p. 19 (1970).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a counterweighing concern to its desire for national uniformity. See House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong. (1970) p. 4116 (hereinafter "House Report"): "[Section 205] provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area." As stated in Senate Report No. 91-619, U.S. Code Cong. and Admin. News, 91st Cong. (1969) pp. 8-9 (hereinafter "Senate Report"):

> On the other hand, the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

B. The Primary Purpose Of The FRSA Is To Promote Safety In All Areas Of Railroad Operations.

Congress's paramount concern for safety was the reason it enacted the FRSA. House Report, U.S. Code Cong. and Admin. News, pp. 4105-4108; Senate Report, pp. 1-5. Consequently, Congress did not authorize the Federal Railroad Administration to preempt state railroad safety regulations unless there were federal regulations on the same subject matter as the state regulations.

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203, (1952). *See also, Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 416 U.S. 190, 206 (1983). The Court is especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. *See Hillsborough County, Florida v. Auto Med. Labs*, 471 U.S. 707, 105 S.Ct. 2371, 2376 (1985); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487-488 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1686 (1985). Where, as here, a state's police power is involved, federal preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 319, 324 n. 8 (lst Cir. 1969).

Statutes regulating the subject matter of walkways, as involved in the Fifth and Ninth Circuit cases discussed herein, address the safety concerns of those who work near railroad tracks in yards. Federal regulations do not require safe walkways. Regarding issues of rail safety, Congress has clearly stated that states may regulate until the federal

government has adopted a standard covering the subject matter of the State requirement. Congress has "unmistakably ordained" that states can regulate rail safety. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

As Congress has explicitly provided for state regulations of railroad safety in certain circumstances, it cannot be argued that the nature of the regulated subject matter mandates federal preemption of state railroad safety regulations. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the necessary clear manifestation of congressional preemptive intent and the irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul, supra*.

Section 434 of the FRSA evidences a two part test for establishing when states can regulate for rail safety without failing as preempted. The states can regulate:

> (1) Where the Secretary of Transportation has not yet adopted a rule, regulation, order, or standard covering the subject matter of the State requirement; and,
>
> (2) Where the Secretary has promulgated a rule, regulation, order or standard covering the same subject matter as the State requirement and the State regulation:
>
> > a) is necessary to eliminate or reduce an essentially local safety hazard, and
> >
> > b) is not incompatible with any federal provision, and

c) does not create an undue burden on interstate commerce.

See, Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

III.

THE NINTH AND FIFTH CIRCUITS HAVE RENDERED DECISIONS WHICH ESTABLISH CONFLICTING APPROACHES TO THE APPLICATION AND INTERPRETATION OF § 434 OF THE FRSA.

A. The Ninth Circuit Has Concluded That State and Federal Regulations Cannot be Held to Cover the Same Subject Matter Unless They Address the Same Safety Concerns.

Courts that have interpreted the preemption language of 45 U.S.C. § 434 are in conflict concerning whether the federal regulation must cover the same specific subject matter before preemption of any state regulation is found.

The Ninth circuit, addressed the issue of federal preemption of a state regulation which *inter alia*, required railroads to provide walkways on each side of their tracks, in *Southern Pacific Transp. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986), *aff'd.*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*) (Appendices F, G). That Court addressed the question of whether federal regulations relating to track support structure, also covered the subject matter of walkways.

The railroad had advanced several arguments in that case in support of its contention that the California walkway rule was preempted. The most important of which, for purposes of comparison with the Fifth Circuit decision, was the railroad's suggestion that the FRA's existing track regulations covered the same subject matter as the walkway regulation proposed by the California legislature. The railroad, citing the FRA's track safety regulations, noted that the FRA regulations established standards governing the subgrade and ballast on which the tracks were laid. *Id.* at 1224. The railroad submitted evidence that the state requirements of a walkway would require an extension of the ballast or subgrade, and as such should be preempted. *Id.* The railroad suggested to the court that because the state and federal regulations affect the same area of railroad operations, then they cover the same subject matter under § 434, and thus the state regulations should have been preempted. *Id.* at 1225.

Judge William Schwarzer, referring to the legislative history of the FRSA pointed out that,

> [T]he legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was "to promote safety in all areas of railroad operations." H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104 [cited as House Report]; see also 45 U.S.C.A. §421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operation. House Report at 4106. Read in light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted. State and federal regulations therefore cannot be held to cover the

> same subject matter unless they address the same safety concerns.

Id. The court went on to note that "[t]he ballast regulations relied upon by [Southern Pacific] are designed to insure that tracks have adequate support," and that "[t]he regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. *See* 49 C.F.R. § 213.37 (1985)." *Id.* The court concluded that "[n]o FRA regulation addresses the concern that employees have a safe working environment near railroad tracks." *Id.*

The court supported its reading of the §434 preemption exception, with *National Association of Regulatory Commissioners v. Coleman*, 542 F. 2d 11 (3rd Cir. 1976). There, the Third Circuit held that only the precise subject matter of the FRA regulations, monthly accident reporting requirements, was beyond a state's regulatory authority. The Third Circuit concluded, however, that FRA regulation of monthly accident reporting requirements would not preclude states from 1) requiring immediate notification of rail accidents, or 2) being furnished with copies of monthly FRA reports. *Id.* at 15.

Thus, the Ninth Circuit's view of preemption denies regulation by the state only if the precise safety concern is covered. That a state regulation may have physical proximity to an area covered by a federal regulation is not sufficient to deny state action.

B. <u>The Fifth Circuit Has Concluded That If A State Regulation Has the Effect Of Regulating A Subject Matter Which "Functionally Overlaps" A Subject Matter Covered By FRA Regulations, The State Regulation Does Not Foster National Rail</u>

Safety Standards To The Extent Practicable And Is Preempted.

The decisions in MOPAC I and MOPAC II represent the current preemption law in the Fifth Circuit. The MOPAC I court, addressing precisely the same matter of state walkway requirements at issue in *Southern Pacific*, specifically rejected the approach used by the *Southern Pacific* court, concluding that it was "overly simplistic." 833 F. 2d at 574. The Fifth Circuit began its discussion citing the holding of *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, that "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute," and that "[t]he test of whether both federal and state regulations may operate...is whether both regulations can be enforced without impairing the superintendence of the field, not whether they are aimed at similar or different objectives." 833 F.2d at 573.

The Fifth Circuit expressed concern that "[i]f the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area". The court went on to note that "[f]ederal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations 'cover the subject matter.'" *Id.* at 574.

The MOPAC court, repeatedly relied on the introductory language of § 434, directing the establishment of uniform national rail safety standards to the extent practicable, and concluded that "[i]t would be impracticable and inconsistent with this intent, if, assuming walkways are integrally related to track structure and composition, 50 states could establish individual walkway regulations in addition to the FRA standards." *Id.* The Fifth Circuit,

indicated in *MOPAC I* that it was guided primarily by concerns for uniformity of regulations, unlike the Ninth Circuit, which was guided primarily by concerns for safety. The MOPAC court so held despite that FRSA expressly sanctions different state approaches until the FRA steps in.

This Fifth Circuit concern for uniformity had earlier been voiced in *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973). There, the court interpreted § 434 and concluded that "[t]he ultimate goal of the Act is to establish nationally uniform control of railroad safety." The court added that the exceptions in § 434 provided only a "narrow spectrum of deviation from national uniformity...." This holding foreshadowed the Fifth Circuit's failure, in the case at bar, to give weight to the States' ability to act until the FRA takes action.

Employing a "practical" approach, and with an eye toward federal uniformity of railroad safety laws, the MOPAC court addressed whether walkways were a subject matter that was covered by federal regulations. The court reasoned that "[i]f the [state] walkway regulation has [the effect of requiring the railroad to strengthen or enlarge the roadbed beyond the FRA requirements], we hold that the federal regulation has 'covered the subject matter' of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards 'to the extent practicable.'" *Id.* The Fifth Circuit, in a footnote distinguished between "a functionally overlapping state regulation and one not 'covered by the subject matter' of an FRA regulation." *Id.* The court suggested that the FRA may be found to have adopted a regulation covering a subject wherever it is found, after investigation, that a state regulation functionally overlaps some object or aspect of railroad safety covered by an FRA regulation. The Fifth Circuit proceeded to remand the issue of state requirement of walkways, for a factual determination to establish whether both state and federal

regulations could be enforced without impairing the superintendence of the field.

The Fifth Circuit's reference to functional overlap in its search for a practical approach to the question of whether a statute "covers the subject matter" raises more questions than it answers, and ultimately places national uniformity ahead of the FRSA goal of rail safety and Congress's intent that States have continued involvement.

C. The Fifth Circuit Interpretation of § 434 Directly Contradicts Congressional Intent And The Plain Meaning Of That Section.

The Fifth Circuit's approach to determining whether the federal regulation has 'covered the subject mater' of the state regulation is overly broad in its application of the doctrine of preemption in § 434. The Fifth Circuit approach does not permit state regulations to be promulgated pursuant to § 434 in instances where the federal agency has not regulated the same subject matter. Under the FRSA, state regulations are co-equal with other federal regulations when the state regulation covers an area where the federal authorities have not actually adopted a regulation. The state is, in essence, regulating for the federal government until the federal agency does so. If, for example, two federal regulations had a potential, "practical" impact on one another, an independent factual inquiry would not be required. Well-established rules of statutory construction would require that the rules be interpreted so as not to conflict.

Indeed, it is undisputed that the FRA could promulgate a walkway requirement. Such a rule could not have more or less practical impact on the other existing federal rules than a state regulation. But, evidencing a paralysis of unknown origin, that agency has refused to ever formally act on this subject. The FRA's inaction has

created a void in federal safety rules which the States, under FRSA, should be permitted to fill.

Finally, the Fifth Circuit analysis ignores the plain meaning of § 434 by allowing the general desire for national uniformity to determine the boundaries of state regulation. The Fifth Circuit's "functional overlap" test suggests that the subject matter of a federal regulation be defined, after the fact, by comparing the physical proximity of an object or area of federal regulation to the object or area the state seeks to regulate. This creates an elusive standard. States might be prevented from regulating safety of railroad operations within their borders based only on the physical location of the object that they seek to regulate. Such a result completely contradicts the purposes of the FRSA goal to promote rail safety and § 434's explicit inclusion of state regulation in furtherance thereof.

As stated by the Ninth Circuit, until the FRA has regulated a subject matter, states are not preempted from doing so. The Fifth Circuit's "functional overlap" test raises more questions than it answers regarding the application of § 434, and it allows the preemption of any state safety regulation for the sake of uniformity in contradiction of the purposes of the FRSA.

CONCLUSION

Review by this Court is necessary to resolve the conflict among the circuit courts on the issue of preemption of state-enacted railroad walkway regulations. In addition, the Fifth Circuit's ruling in the instant case, overly emphasizes national uniformity of regulation at the expense of the FRSA's primary goal of rail safety.

Respectfully submitted,

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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

MISSOURI PACIFIC RAILROAD COMPANY, et al., Plaintiffs-Appellees/Cross-Appellants,

v.

RAILROAD COMMISSION OF TEXAS and its members, et al., Defendants-Appellants/Cross-Appellees.

No. 90-8574.

United States Court of Appeals, Fifth Circuit.

December 6, 1991.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case, we decide whether the Tex. Admin. Code tit. 16, § 5.619, which requires railroads to construct and maintain walkways adjacent to railroad trackage in accordance with certain specifications, is preempted by the Federal Railroad Safety Act of 1970 (the Act), 45 U.S.C. § 421 *et seq.* The district court held that the state walkway provision was preempted, and we now affirm.

I.

In 1986, the Railroad Commission of Texas (the Commission) adopted section 5.619 pursuant to Tex. Rev. Civ. Stat. Ann. art. 6448a, which authorizes the Commission "to perform any act and issue any rules and orders as permitted by" the Act. The railroads filed this action against the Commission, seeking the invalidation of a series of rail safety regulations, including section 5.619. The railroads alleged, *inter alia*, that the regulations were preempted by federal law, constituted an undue burden on interstate commerce, and were arbitrary, capricious, and not supported by substantial evidence. The district court granted the railroads' motion for partial summary judgment, 653 F. Supp. 617, holding that the regulations were preempted by federal law.

On appeal, we affirmed the district court's decision except as applied to section 5.619. *Missouri Pacific R.R. v. Railroad Comm'n*, 833 F.2d 570 (5th Cir. 1987) (*MoPac I*). We held that summary judgment was inappropriate with regard to section 5.619 because there existed "a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations." *Id.* at 575. We therefore remanded the case for trial on this issue.

By stipulation, the parties agreed that the case would be tried to the court solely on documentary evidence. After considering all the evidence, the court concluded that section 5.619 was preempted by federal law and dismissed the remaining claims as moot. The Commission now appeals the court's conclusion on the preemption issue; the railroads cross-appeal the dismissal of their remaining claims.

II.

We review the court's legal conclusions *de novo* and its factual findings for clear error. Fed. R. Civ. P. 52(a); *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1058 (5th Cir. 1991).[1] More specifically, we will reject the district court's factual findings "only if our review of the entire record impels the definite and firm conviction that a mistake has been committed." *Carr*, 931 F.2d at 1058 (citation omitted). This standard is a deferential one: If the district court's account of the evidence is plausible in light of the whole record, we may not reverse it even though we would have weighed the evidence differently had we been sitting as the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). *See also Houston Oil & Minerals Corp. v. American Int'l Tool Co.*, 827 F.2d 1049, 1055 (5th Cir. 1987), *cert. denied*, 484 U.S. 1067, 108 S.Ct. 1031, 98 L.Ed.2d 995 (1988).

III.

Section 5.619(a)(1) mandates the construction of walkways "alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track." The walkways

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[1] In a case cited by the railroads, we noted that "the degree of deference to be accorded a district court's findings of fact is lower when the case is submitted wholly on documents than in the situation where the evidence is presented by witnesses appearing before the district court." *Bull's Corner Restaurant v. Director of the Fed. Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir. 1985) (quoting *Onaway Transp. Co. v. Offshore Tugs, Inc.*, 695 F.2d 197, 200 (5th Cir. 1983)). *Bull's Corner*, however, was decided before the 1985 amendment to rule 52(a), which now reads, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...." *See also McFarland v. T. E. Mercer Trucking Co.*, 781 F.2d 1146, 1148 (5th Cir. 1986) (*Bull's Corner's* distinction no longer valid given 1985 amendment).

are to extend a minimum of six feet from the "outside end of the crossties." §5.619(d). The state regulation also specifies the surface condition, slope, and location of the walkways. *See* §5.619(b), (c) & (e).

No federal regulation directly addresses or requires the construction of walkways. Federal regulations do, however, govern the roadbed and track support materials to which the walkways would be attached. 49 C.F.R., subparts B & D.[2] As we noted in *MoPac I*, "[l]iterally and figuratively, the walkways required by the state regulations sit atop and adjoin the roadbed for which [federal regulation] has prescribed minimum specifications." 833 F.2d at 574.

When, as in this case, a state's exercise of its police power is challenged under the Supremacy Clause, we start with the assumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (citations omitted). The purpose of Congress can be found in the language of the FRSA, which declares that

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[2]The roadbed is the area of soil that supports the ballast, which is the "permeable, granular materials such as sand, gravel, crushed rock or slag, chat, cinders, and so on placed around and under the ties to promote track stability." William W. Hay, *Railroad Engineering*, 393 (2d ed. 1982). Under federal regulations, the roadbed and "areas immediately adjacent to [the] roadbed" must be maintained in order to prevent vegetation and drainage problems. 49 C.F.R. §§ 213.31, 213.33, 213.37. The ballast must "[t]ransmit and distribute the load of the track and railroad rolling equipment" to the roadbed; "[r]estrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails"; "[p]rovide adequate drainage for the track"; and "[m]aintain proper track cross-level, surface, and alinement." 49 C.F.R. §§ 213.103(a), (b), (c) & (d).

> laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard *covering the subject matter of such State requirement*. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety *when necessary to eliminate or reduce an essentially local safety hazard*, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added). Thus, whereas section 434 mandates national railroad safety standards "to the extent practicable," it permits states to regulate in two situations.

The first is where "no federal standard has yet been adopted 'covering the subject matter' of the state regulation." *MoPac I*, 833 F.2d at 573. The second is where the state seeks "to eliminate or reduce 'an essentially local safety hazard'" *Id.*

In *MoPac I*, we addressed section 5.619 in the former context. *Id.* at 573 n. 2. We stated that railroad walkways would be "subject matter" that was "covered" by federal regulation "if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the [federal] standards by requiring the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *Id.* at 575 (footnote omitted).

On remand, the district court found that section 5.619 was preempted because the requirements of the walkway provision would in fact add to the federal standards. In the alternative, the court held that section 5.619 could not be justified as addressing a "local safety hazard" because the regulation has statewide application.

We first address the district court's holding that section 5.619 adds to federal requirements, and then turn to its alternative holding. Finally, we address the parties' remaining grounds for error, including the railroads' cross-appeal.

IV.

A.

We asked the district court on remand to answer the following question: whether the state walkway specifications "requir[e] the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *MoPac I*, 833 F2d at 575. The district court held that "the roadbed would, in fact, have to be enlarged laterally and strengthened in order to support the walkway." It went on to state that "the body of material used to support the walkway would have to adjoin the roadbed in such a way that it would be integrated with it and, in essence, merely become an extension of it."

The district court based its conclusion in part upon testimony provided by the railroads' expert, Robert E. Ahlf, a railroad engineering consultant who had collected data on the trackage affected by the walkway regulation. He concluded that in order to accommodate the walkways required by section 5.619, the track support structures would have to be enlarged in approximately forty percent of the trackage on which walkways would be built. The court also relied upon caselaw from other jurisdictions in

which courts have held that state regulations covering walkways are preempted by federal regulations on the ground that walkways are an integral part of track support structures.[3]

The Commission contends that its evidence effectively rebuts the evidence presented by the railroads, and that therefore we should reverse the district court's finding that the roadbeds and track support structures would have to be enlarged beyond federal requirements in order to accommodate the walkways. The Commission essentially reargues the evidence it presented to the district court. For example, the Commission points to the fact that its expert, Dr. W. Ronald Hudson, a transportation engineering professor, testified that walkways are not an integral part of the track structure because they do not bear the load created by the train traffic. They also refer to testimony by another Commission witness, Vence L. Haggard, a railroad safety inspector for the Commission, who stated that the federal regulations apply only to the traffic-bearing portions of the roadbed.

The Commission must show, however, that the district court clearly erred. This it cannot do. There is nothing in our review of the record that leaves us with "the definite and firm conviction that a mistake has been

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[3]*See Norfolk & Western Ry. v. Burns*, 587 F.Supp. 161, 170 (E.D. Mich. 1984) (state occupational safety and health regulations along walkways preempted by FRSA); *Black v. Baltimore & Ohio R.R.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980) (allegations of muddy conditions in areas adjacent to track based upon state law claims preempted by FRSA); *Black v. Seaboard System R.R.*, 487 N.E.2d 468 (Ind.Ct.App. 1986) (state standards for construction and maintenance of walkways preempted by FRSA). ***But see Illinois Cent. Gulf R.R. v. Tennessee Pub. Serv. Comm'n***, 736 S.W.2d 112 (Tenn.Ct.App. 1987) (state walkway regulations not preempted by FRSA); *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987) (same).

committed." *Carr*, 931 F.2d at 1058. In this case, the district court found the evidence presented by the railroads' expert to be "more persuasive" and "more credible" than that presented by the Commission's experts. Although both the Commission and the railroads presented convincing evidence, we cannot "reverse the trial court's selection" where "there are two or more permissible views of the record evidence." *Houston Oil*, 827 F.2d at 1055 (citation omitted).

B.

The district court also found that the construction of walkways would impair drainage and weaken the track support structures. Federal regulations require that the track be supported by material that will "[t]ransmit and distribute the load of the track and railroad rolling equipment to the [roadbed]" as well as "[p]rovide adequate drainage for the track." 49 C.F.R. §§ 213.103(a) & (c). In essence, the court held that the walkway provision would not only "add" to federal requirements, it would actually contravene them.

Both the railroads and the Commission produced expert testimony on this issue. Ahlf testified that the railroads generally use large-diameter stone material under the tracks because such material provides greater support for the train traffic and maximum drainage capability. According to Ahlf, the smaller material mandated by the state walkway regulation[4] would, during regular maintenance

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[4]Section 5.619(b)(2) requires that walkways be surfaced with "crushed materials not to exceed 1 1/2 inches in size or with asphalt, concrete, secured planking, grating, or similar material." Ahlf testified that railroads generally used much larger material to support the track. Although the state regulation allows the railroads to use material other than crushed stone under the walkways, one of the Commission's experts (Hudson) conceded that as a practical matter crushed stone is

procedures, mix with the larger material under the track. This, Ahlf concluded, would cause drainage problems and weaken the ability of the track structure to support train traffic.

Hudson testified that there would be no drainage problem because the material used in constructing the walkways would be permeable. The Commission concludes from this that any impediment would only be "hypothetical," "much in this same sense that a sieve acts as a hypothetical impediment to water poured through it." The Commission's expert also noted that the track structure and roadbed would be weakened only if the railroads continued to use their current maintenance procedures, which should be disregarded because such procedures "are wholly in the hands of the railroads."

Again, the district court found the railroads' expert to be more convincing. Again, we cannot say that the district court's choice is clearly erroneous. Moreover, the issue is somewhat beside the point. Even if the addition of walkways did not create drainage problems or weaken the roadbed, the state provisions would still require the railroads to enlarge and strengthen existing roadbeds to accommodate the walkways--which is enough to support a finding of preemption under our analysis in *MoPac I*.

C.

The Commission also maintains that the district court impermissibly considered the cost to the railroads of constructing these walkways. It points to the court's statement that "[i]t is a specious argument to say simply that section 5.619 merely requires a walkway and that it is up to the railroads to comply by whatever means or cost

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the material most likely to be used.

necessary." The court, however, was merely responding to the Commission's argument that, as the court phrased it, "the walkway requirement is a rule with independent application from the federal regulations and that compliance with the walkway rule would have no impact on compliance with the federal regulations."

In essence, the district court was suggesting that regardless of whether it was theoretically possible to comply with both federal and state regulations, the state walkway requirement would still have a practical impact on compliance with federal regulations in that it would require the railroads to enlarge or strengthen the track support structures beyond federal requirements. Thus, while the district court did consider the structural changes that were necessary for the railroads to comply with the state's walkway regulation in light of the current material composition of its track-support structures and the procedures used to maintain them, it did not consider the cost of enlarging these structures *per se*. Thus, we do not find that the district court impermissibly relied upon cost of compliance.

D.

Finally, the Commission complains that it was "reversible error" for the district court to have relied upon a 1978 Policy Statement by the Federal Railroad Administration (FRA), the government agency that enforces the FRSA. The policy statement delineates the respective responsibilities of the FRA and the Occupational Safety and Health Administration (OSHA) with regard to railroad safety matters. It states that OSHA should not regulate "walkways beside the tracks in yards or along the right-of-way" because

> [t]hese are areas which are so much a part of the operating environment that they must be

> regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

43 Fed.Reg. 10,583, 10,587 (1978).

In a 1986 opinion letter, the Chief Counsel of the FRA stated that section 5.619 was preempted by federal regulation because the subject matter had been covered by federal regulation. The Chief Counsel relied upon the 1978 Policy Statement. The district court noted the existence of both documents in summarizing the railroads' evidence.[5]

The Commission argues that the court's reliance upon the policy statement was improper because we "specifically rejected" it in *MoPac I*. In *MoPac I*, we did reject the railroads' reliance upon the policy statement to show that federal regulation preempted section 5.619 because the FRA had failed to promulgate regulations with regard to walkways. The railroads argued that the "FRA, by declining to promulgate various walkway regulations in the past, has specifically intended to 'cover the subject matter' of walkways so as to preempt state regulations." 833 F.2d at 575. We rejected this reasoning, noting that

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[5]The district court mentioned the policy statement after noting that there had been a great deal of practical involvement of the FRA in inspecting areas adjacent to the roadbeds. The railroads submitted evidence showing that the FRA has regulated walkway conditions on at least two recent occasions in Texas. The district court concluded from this, as well as from the policy statement, that while the FRSA does not specifically refer to walkways, the FRA has asserted jurisdiction over this area of railroad safety.

the FRA in its statement seemed to be saying "we haven't looked at walkways yet" rather than "we haven't done anything because we have determined it is appropriate to do nothing." *MoPac I*, 855 F.2d at 576. Thus, we concluded that "the FRA's statement implies that unless walkway regulations are otherwise preempted, e.g., by FRA track and roadbed regulations that 'cover the subject matter,' § 434 could authorize state regulation until the FRA acts." *Id.*

Thus, in *MoPac I* we rejected the use of the FRA policy statement only to the extent that the railroads utilized it in an attempt to show that state walkway regulations were preempted because the FRA had failed to act on the subject. We did not say, however, that the statement could not be used to show that the state regulations would be preempted if the FRA chose to act. That is what the district court found in this case when it held that the roadbeds would have to be extended beyond federal specifications in order to accommodate the walkways. We therefore reject the Commission's suggestion that the "district court's decision is irreparably tainted" by its consideration of the policy statement and opinion letter.

V.

After concluding that the state walkway provision would be preempted under the section 434 because federal regulations had covered the subject matter, the district court went on to find in the alternative that the provision could not be justified as addressing a "local safety hazard." Under section 434, a state may adopt "an additional or more stringent law, rule, regulation, order, or standard" when such state regulation (1) is "necessary to eliminate or reduce an essentially local safety hazard"; (2) is "not incompatible with" federal regulations; and (3) does not create "an undue burden on interstate commerce." 45 U.S.C. § 434; *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.),

cert. denied, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973). The district court held that the walkway provision failed the first prong of the test because it is applicable statewide and therefore could not address a "local" safety hazard. The court also noted that the state provision would fail the second prong of the test as well because it would, *inter alia*, "impede the drainage capability of the track structure."

The Commission claims that the court erred in considering the "local safety hazard" exception in this instance. It argues that it has "always conceded that the walkways rule has statewide application" and that it has not attempted to justify the regulation under the "local safety hazard" test of section 434. We noted this fact in *MoPac I*, where we stated that "the Commission does not seek to justify the challenged regulations under the [local hazard] alternative, and we shall therefore not discuss it." 833 F.2d at 573 n. 2. Our position is the same today. Because we rest our affirmance on the district court's finding that the walkway provision would require railroads to enlarge track support structures beyond federal requirements, we need not and do not reach the propriety of the district court's alternative holding.

The Commission responds by requesting us to "strike the [district court's] further finding that the regulation is incompatible with federal regulations" on the ground that such a finding "could prevent the Commission from requiring a safe working area in a specific location...." We decline to take such action. We do, however, note that the lower court's finding on the issue of incompatibility is an alternative holding, and we leave it to future courts to treat it accordingly.

VI.

[9] The Commission also asks us to reconsider our earlier decision in *MoPac I* to use a "practical" factual test for determining the meaning of the phrase "covering the subject matter of such State requirement" found in section 434. It contends that our panel's test ignores the plain language of this section as determined by the Ninth Circuit in *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 647 F.Supp. 1220 (N.D.Cal. 1986), *aff'd per curiam*, 820 F.2d 1111 (9th Cir. 1987); our circuit's preemption principles as described in *Burlington N.R.R. v. Public Util. Comm'n*, 812 F.2d 231 (5th Cir. 1987); congressional intent as indicated in the hearings on the FRSA; and with the Supreme Court's decisions on the federal preemption of state regulations.

We see no reason to reconsider our earlier decision. First, we considered and rejected the Commission's arguments in *MoPac I*. Second, as the railroads correctly point out, the Commission did not appeal our *MoPac I* decision. Finally, it is a "well known and longstanding rule of decision in this circuit that one panel cannot overrule another." *Samaad v. City of Dallas*, 922 F.2d 216, 219 (5th Cir. 1991) (footnote omitted). We therefor reaffirm our holding in *MoPac I*.

VII.

[10] On their cross-appeal, the railroads contend that the district court erred in not ruling on their remaining causes of action. This argument is without merit. In *MoPac I*, we stated that "[i]f the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion." 833 F.2d at 576. Because the district court found that section 5.619 is

preempted, it did not need to reach the railroads' additional causes of action. The district court's dismissal of those remaining claims therefore was proper.

VIII.

In sum, the district court's finding that section 5.619 would require the railroads to enlarge or strengthen existing roadbeds to accommodate walkways is not clearly erroneous. We therefore AFFIRM its decision that section 5.619 is preempted by federal regulation based upon our preemption analysis set forth in *MoPac I*. Because we affirm the court's decision on this ground, we decline to reach the propriety of the district court's alternative holding that section 5.619 cannot be justified as addressing a "local safety hazard" under 45 U.S.C. § 434. We also decline to reconsider the preemption analysis we set forth in *MoPac I*. Finally, with regard to the railroads' cross-appeal, we AFFIRM the district court's dismissal of their remaining causes of action.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8574

D.C. Docket No. A-86 CA 406

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Plaintiffs-Appellees
Cross-Appellant,

versus

RAILROAD COMMISSION OF TEXAS
and its members, et al.,

Defendants-Appellant
Cross-Appellees.

Appeals from the United States District Court for the Western District of Texas

Before WISDOM, JOLLY and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants cross-appellees pay to plaintiffs-appellees cross-appellants the costs on appeal to be taxed by the Clerk of this Court.

December 6, 1991

ISSUED AS MANDATE: Dec. 30, 1991

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MISSOURI PACIFIC	§	
RAILROAD, CO., ET AL.	§	
	§	
VS.	§	CIVIL NO. A-86-CA-406
	§	
RAILROAD	§	
COMMISSION	§	
OF TEXAS, ET AL.	§	

ORDER

This cause came before the Court on remand from the Fifth Circuit Court of Appeals for a trial on the merits. On July 22, 1986, Plaintiffs filed their Complaint in this Court seeking declaratory and injunctive relief. The Defendants timely answered, and on October 1, 1986, the Plaintiffs filed their motion for partial summary judgment. The Court granted the motion for partial summary judgment on January 27, 1987, which was published as *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 653 F.Supp. 617 (W.D. Tex. 1987), and the Defendants appealed. The Fifth Circuit reversed and rendered in part, affirmed in part and reversed and remanded in part. *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570 (5th Cir. 1987).

The Fifth Circuit reversed and remanded on the issue of whether 16 Tex. Admin. Code § 5.619, requiring

the construction of walkways in areas on or immediately adjacent to the railroad track roadbed, is preempted by federal regulations regulating the roadbed, track geometry and track structure. Specifically, the Fifth Circuit found that summary judgment was improper because there was a material issue of fact concerning "the interrelationship between the state walkway requirement and federal track regulations." *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 575 (5th Cir. 1987).

By Amended Complaint, filed on August 19, 1988, Plaintiffs have asserted five causes of action, alleging: (1) that the walkway rule is preempted by the Federal Railroad Safety Act, 45 U.S.C. §§ 421-441, and its attendant regulations, by total federal occupation of the subject matter; (2) that the walkway rule is preempted by the Federal Railroad Safety act and its attendant regulations by failure to address a local safety hazard; (3) that the walkway rule is preempted by the Federal Railroad Safety Act and its attendant regulations for creation of an undue burden on interstate commerce; (4) that the walkway rule is constitutionally impermissible for creation of an undue burden on interstate commerce; and (5) that the Commission's adoption of the walkway rule was an arbitrary and capricious action, unsupported by substantial evidence.

The Plaintiffs' first four causes of action seek essentially the same relief, a declaration by this Court that the Texas walkway rule is preempted by federal law, and an injunction against its enforcement. Only the rationale for each of the first four causes of action differs.

On January 16, 1989, the parties submitted trial briefs in anticipation of a trial before the Court. On January 19, 1989, the parties filed a Stipulation By All Parties, stating that they were in agreement that "[t]he nonjury trial on the merits of this cause [would] be submitted solely on written documentation" of evidence,

including affidavits or verified statements, depositions, exhibits, interrogatories, requests for admissions and response thereto. The Court signed the stipulation and requested that the parties submit final arguments, which were to include the parties' evaluation of the evidence submitted.

On August 23, 1990, a hearing was held, during which the parties were given an opportunity to orally evaluate their own and their opponent's evidence and present oral argument on the issues of law before the Court. At the conclusion of the hearing, the parties were asked to submit proposed findings of fact and conclusions of law in support of their relative positions.

In the first subsection of this opinion, the Court will first discuss generally the issue of preemption as it applies to this case. In the following subsections, the Court will make findings of fact and conclusions of law based on all the documented evidence and legal arguments presented to the Court.

I. PREEMPTION

The Supremacy Clause, U.S. CONST. art. VI, cl. 2, nullifies state laws that "interfere with or are contrary to" federal law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.). Congress is authorized to absolutely preempt state rulemaking authority in a particular area. *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190 (1983). Thus, if it appears that the federal statutes and related regulations in this case completely occupy the field of rail safety, including roadbed, track structure and walkways, all state regulation in this field would be preempted. The operative federal statute relating to this issue is the Federal Railway Safety Act ("FRSA"), 45 U.S.C. § 421-441. In the

FRSA, Congress specifically declared that regulations relating to railroad safety shall be nationally uniform "to the extent practicable." Section 434 of the FRSA provides:

> The Congress declares that laws, rules, regulations orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Under the terms of section 434, if, in light of Congressional policy and FRA actions, there is a national rule, regulation, order or standard that has been adopted "covering the subject matter" of the state regulation, section 5.619 is preempted. If federal legislation and regulations merely address rail safety matters, but do not wholly occupy the field, section 5.619 would be permitted only if: (1) necessary to eliminate or reduce an essentially local safety hazard; (2) not incompatible with any federal provision; and (3) not creating an undue burden on interstate commerce. The state would be required to establish each of the elements of this narrow exception in order to avoid preemption.

II. PLAINTIFFS' FIRST CAUSE OF ACTION

Addressing Plaintiffs' first cause of action, the Court must determine from the evidence and arguments presented whether 16 T.A.C. § 5.619 is preempted by a total federal occupation of the field, or more specifically whether the FRSA and its attendant regulations, 49 C.F.R. part 213, have "covered the subject matter" of section 5.619.

In the appeal of this case, the Fifth Circuit took a pragmatic as well as a legal approach in addressing whether a national rule, regulation, order or standard has been adopted "covering the subject matter" of the challenged state regulation. 833 F.2d at 573, 574. In remanding the case, the Fifth Circuit stated, "if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements . . . we [would] hold that the federal regulation has 'covered the subject matter' of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards 'to the extent practicable.'" 833 F.2d at 575. This Court, then, in determining whether federal law covers the subject matter of section 5.619, must determine from the evidence before it whether, from a practical viewpoint, the state walkway rule would have the effect of adding to the FRA standards by requiring the railroads to strengthen or enlarge the roadbed beyond the FRA requirements.

Section 5.619 requires the construction of walkways in areas on or immediately adjacent to the roadbed. By definition, these walkways shall be constructed "alongside a railroad track or railroad switch . . .." 16 T.A.C. § 5.619(a). Section 5.619 subsection (b) states:

> Walkways shall be located along tracks in yards, terminals, and at other points where switching, car spotting, or train or car inspections may reasonably be expected to be performed during the normal course of business.

16 T.A.C. § 5.619. Walkway surface slope and width specification are established in subsections (c), (d) and (e). Subsections (f), (g), (h) and (i) detail specific locations where walkways are required.

The walkways required by state regulations sit atop and adjoin the roadbed for which FRA has prescribed minimum specifications. The FRA has adopted comprehensive regulations that govern standards for the roadbed, track geometry and track structure, and specifically covers areas "adjacent to the roadbed" as well as track gauge, alignment, surface, ballast, drainage and component parts. 49 C.F.R. 213.31-213.143 (1989).

A. Plaintiffs' Evidence

Plaintiffs have submitted the report of Robert E. Ahlf to demonstrate the engineering and economic impact of § 5.619 on the Texas Class I railroads. Mr. Ahlf is a self-employed Railway Development Consultant who obtained a Bachelor of Science degree in Civil Engineering in 1966 from the University of Florida and a Master of Science degree in Transportation, which included a minor in Railway Civil Engineering, in 1968 from the University of Tennessee. Mr. Ahlf's postgraduate emphasis on Railway Civil Engineering was under the tutelage of Dr. W. W. Hay, nationally recognized as the primary contemporary authority in American railway engineering.

After obtaining his postgraduate degree, Mr. Ahlf spent seventeen years with the Illinois Central Gulf railroad,

working his way up through positions including Assistant Division Engineer and Chief Operations Planner. During the last ten years with the ICG railroad, Mr. Ahlf's duties included direct field responsibilities for rehabilitation of hundreds of miles of mainline track through open country and through yards and cities; he also was responsible for the basic field engineering and design to rehabilitate and reconfigure two major ICG yards and its main thoroughfare trackage in Jackson, Mississippi.

Since leaving the ICG in 1985, Mr. Ahlf has been retained on several occasions to evaluate design and costs of rehabilitation projects on various railroads, including industry trackage. Mr. Ahlf has also served as committee chairman for a research project for the Association of American Railroads entitled "Ballast and Subgrade Interaction Considerations - Report No. AP139," published by the AAR Technical Center for the Research and Test Department of the AAR in December of 1988. In short, Mr. Ahlf's entire professional career has centered on railroad engineering, including analysis, design, field supervision, economic justification and preparation of specifications and contracts.

Mr. Ahlf's report is based on extensive factual data contained in survey forms and verified statements prepared by railroad operator witnesses. The Court is in possession of these verified statements and survey forms submitted by R. D. Bredenberg, Gary Lilly, J. B. Miller, Donald M. Tate, and Larry Fields.

Mr. Ahlf explains in his report that the basic components of track structure are the rail, ties, ballast and subgrade (or roadbed).[6] The roadbed supports the ballast,

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[6] The term "ballast" refers to a "permeable, granular material such as sand, gravel, crushed rock, or slag, chat, cinders, and so on, placed around and under the ties to promote track stability." William W. Hay,

including the ballast outside the ends of ties, which provides lateral restraint to the tie/rail structure. Railroads are designed and built to be perpetually renewed by maintenance on a cyclical basis, with individual components replaced periodically and the track lifted and surfaced on new stone ballast, according to Mr. Ahlf.

In Mr. Ahlf's opinion, railroads utilize large, open-voided stone ballast because such large ballast affords greater strength for the lateral, vertical and horizontal forces of rail traffic and maximum drainage capability. Track structures must not only drain water away from the ties and rails so as to prevent the softening of the roadbed, but must also provide for the escape of abraded materials, the fine materials created by the rubbing together of the ballast materials caused by rail traffic. Retention of these abraded materials around ties clogs the voids between ballast stone, tending to trap water in the track structure, according to Mr. Ahlf.

Mr. Ahlf claims that the walkway rule would require the use of a smaller size ballast than that generally used by the railroads, and that routine maintenance will cause the smaller walkway material to become mixed with the ballast material under the track, to the detriment of the track structure. The smaller walkway material, he explains, will adversely affect the drainage of the track structure. Without proper drainage, the track structure is softened and, thus, weakened.

Mr. Ahlf also explains that in at least 41% of the trackage on which walkways would have to be built, the track structure itself would have to be enlarged in order to support the walkway structure. According to this expert, walkways would extend six feet from the end of the railroad

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Railroad Engineering, 1983, 2nd ed. page 393.

tie on both sides of the track, requiring that the roadbed and ballast be enlarged outwardly, substantially in excess of FRA requirements. His report also states that the enlargement of the roadbed and ballast would have to be compatible with the existing roadbed and ballast in such a way as to make them structurally integrated with the existing roadbed and ballast.

In sum, Mr. Ahlf concludes, that the walkway rule would require the strengthening and enlargement of the existing roadbed in a manner that would make the walkway structurally integrated with the existing roadbed and track structure; and the use of material in the walkway, which, in time, would weaken the railway's ability to handle rail traffic stress and provide adequate drainage capability.

Plaintiffs also submitted an opinion letter from the Chief Counsel of the U.S. Department of Transportation, Federal Railroad Administration, Mr. John M. Mason, concluding that the FRA has acted so as to occupy the subject matter of section 5.619. Mr. Mason cites 49 C.F.R. 213 as an FRA provision that prescribes minimum requirements for areas "immediately adjacent" to the roadbed, which although not expressly addressing walkways, would include the walkway area as an area immediately adjacent to the roadbed. He further argues that the FRA currently requires the correction of defective walkways on signal structures under the authority of the Signal Inspection Act. 49 U.S.C. § 26(e).

Plaintiffs have also submitted a 1983 FRA Safety Assessment of Plaintiff, Southern Pacific Transportation Company's Englewood Yard in Houston, and a 1983 Special Assessment of Plaintiff, the Atchison, Topeka and Santa Fe Railway Company's Southern Division, both of which, according to Plaintiffs, demonstrate the FRA's practical involvement in the correction of unsafe existing walkways

pursuant to their jurisdictional authority under the Federal Railroad Safety Act.

Chief Counsel, Mr. Mason, also cites to a Policy Statement in which the FRA expressed its policy that other government entities should be precluded from exercising jurisdiction with respect to areas beside the tracks in yards or along the right-of-way. This area would include the area occupied by walkways. The following is an excerpt from the FRA's policy statement:

> These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to address individual hazards related to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

Policy Statement of Termination of Rulemaking on Railroad Occupation Safety and Health Standards, 43 Fed. Reg. 10, 583, 10,587 (1978).

Plaintiffs argue that, while not controlling, advisory opinions by officers of a federal agency are "entitled to great deference." *Regents of the University of California v. Public Employment Relations Board*, 139 Ca. App. 3d 1037, 1042, 189 Cal. Rptr. 298, 301 (Cal. Ct. App. 1983), *appeal after remand* 182 Cal. App. 3d 71, 227 Cal. Rptr. 57 (Cal. Ct. App. 1986), *review denied* 1986 (citing *Udall v. Tallman*, 380 U.S. 1 (1965)).

(B) Defendants Evidence

Defendants offered the report of Dr. W. Ronald Hudson, who is the Dewitt C. Greer Centennial Professor of Transportation Engineering, in the Department of Civil Engineering at the University of Texas. Dr. Hudson obtained his Bachelors degree in Civil Engineering from Texas A & M University in 1954. He was selected as recipient of the Humble Fellowship in Civil Engineering and completed his Master's degree in Soil Mechanics in 1955. In July of 1955, he entered the U.S. Air Force and spent the next two years as a field engineer in the Air Defense Command doing varied field engineering work in the general area of Civil Engineering. Following the completion of his military service, he went to work as a Soils Engineer for S.J. Buchanan and Associated in Bryan, Texas. In 1958, he accepted employment as the Assistant Chief of the Rigid Pavement Research Branch at the AASHO Road Test (American Association of State Highway Officials) in Ottawa, Illinois. Completing that job, in 1961, he was employed with the service of the Texas Highway Department, where he worked as a supervising and designing engineer for two and a half years, while working on his doctoral degree. His doctoral degree was earned under Professor Hudson Matlock at the University of Texas in the field of engineering mechanics. In 1963, he entered the teaching/research profession at the University of Texas at Austin and has continued in that profession until the present. He is regularly requested as a lecturer all over the world. He is also currently the Technical Director/Manager of a major $6 million project for the $150 million Strategic Highway Research Program. His main areas of expertise are systems analysis, bridge management, load carrying theory and practice in civil engineering, including embankments and roadbeds with primary application in the highway field.

Defendants also presented evidence in the form of verified statements from Mr. Paul W. King, a regulatory analyst for the California Public Utility Commission; Mr. Robert W. Farnsworth, rail safety planner for the Railroad Commission of Texas; and, Mr. Vence L. Haggard, a federally certified Railroad Safety Inspector for the Railroad Commission of texas.

Dr. Hudson, in his verified statement, claims that walkways would not be an integral part of the track structure. From a general engineering point of view, he explains, a walkway could be added or removed from an existing track structure without affecting the load bearing capacity of the track. With respect to the issue of drainage, Dr. Hudson states that the key to good drainage is the use of "open grade" stone, or stone that is all about the same size, and that walkways constructed of such crushed stone, not exceeding 1-1/2" in diameter, would provide exemplary drainage. He claims that stone graded from 1" to 1-1/2" is so permeable that water flows through it at the rate of nearly four miles (20,000') per day. Thus, water that falls on the track would only be in contact with the walkway material less than one minute before draining safely away from the track structure. This type of drainage, Dr. Hudson states, is not only adequate, as required by the federal regulations for track structure, but is excellent.

Dr. Hudson states that walkway stone would not be subject to the dynamic pumping from trains that the ballast stone receives and, thus, would exceed the drainage capabilities of the adjoining track structure. He claims that the issue of whether periodic maintenance of tracks with walkways will adversely affect the ballast structure is wholly in the hands of the railroads, and that if mixing the walkway material with ballast during removal for ballast cleaning is detrimental to the ballast, the railroads simply should not do so. At his deposition, Dr. Hudson suggested that a proper size screen could separate the two materials.

Moreover, Defendants argue that the railroads are fully capable of dealing properly with track that has adjacent walkways because, based on the verified statements of Plaintiffs' experts, Mr. Bredenberg and Mr. Miller, the railroads currently maintain many miles of track with walkways.

Consistent with Dr. Hudson's opinion, Mr. Haggard, a federally certified railroad safety inspector, states in his affidavit that "nothing in the [FRA's] Track Safety Standards is concerned with or addresses walkways, excessive dropoffs next to roadbeds, the prevention of slippery surfaces, uneven surfaces, or foreign objects on surfaces near tracks, or any other footing problems for railroad workers, which is the subject matter addressed in 16 T.A.C. § 5.619."

Mr. Haggard also claims that walkways are not part of the roadbed, which is that area of soil under the railway that structurally supports the track.[7] He states that walkways are merely areas that parallel the roadbed and provide railroad employees a safe place to perform their duties. He also claims that roadbeds would not have to be widened or extended to support the walkway because "walkway fill" could be used to support the walkway. He further adds that walkway material would not interfere with adequate drainage because it would not be located in the cribs between the ties, as the ballast material is, and would not perform the same function as ballast. In sum, Mr. Haggard concludes that the federal regulations apply only to the structure which bears the loads created by train

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[7] Mr. Haggard relies on a definition of "roadbed" taken from the American Railway Engineering Association Manual for Railway Engineers. The Manual states: "The roadbed consists of that zone of soil or rock which supports loads from the track structure and is subject to weathering and deterioration from traffic loads." Volume I, page 1-1-30.

traffic, and that the existence of the walkways would not affect the load bearing portion of the track, or the drainage capacity of the ballast.

(C) Findings of Fact

The experts on both sides present the Court with persuasive arguments. The Court finds more persuasive the testimony and evidence presented by Plaintiffs' experts. The Plaintiffs have adequately demonstrated, through the opinion letter of the Chief Counsel of the FRA, through policy statements of the FRA, and through the practical involvement of the FRA in inspecting the areas adjacent to the roadbed, that it is both the policy and practice of the FRA to govern safety standards in the area immediately adjacent to the roadbed, including the area encompassing the walkway.

Moreover, from the exhibits and testimony presented to the Court by Plaintiffs, the Court is of the opinion that the roadbed would, in fact, have to be enlarged laterally and strengthened in order to support the walkway. Mr. Haggard's opinion on this issue is that the roadbed would not have to be extended because fill material could be used to support the walkway. Nevertheless, it has become clear to the Court, from all the evidence before it, that whether the extension of the roadbed is called "fill" material or "roadbed" material, the body of material used to support the walkway would have to adjoin the roadbed in such a way that it would be integrated with it and, in essence, merely become an extension of it.

Accordingly, the Court finds that the evidence and reports submitted by Plaintiffs' experts on the issue of the extent to which the walkway and extended roadbed would be integrated with the existing roadbed and track structure are more credible than the evidence and reports submitted by Defendants experts on this issue. The Court rejects the

argument that the walkway requirement is a rule with independent application from the federal regulations and that compliance with the walkway rule would have no impact on compliance with the federal regulations. It is a specious argument to say simply that section 5.619 merely requires a walkway and that it is up to the railroads to comply by whatever means or cost necessary.

Several other courts have found that walkway areas are necessarily a part of the track roadbeds and have held that state regulations covering these areas are preempted by 49 C.F.R. 213. *See, e.g., Norfolk and Western Railway Co. v. Burns*, 587 F.Supp. 161, 170 (E.D. Mich. 1984); *Black v. Baltimore and Ohio Railroad Co.*, 398 N.E.2d 1361 (Ind. Ct. App. 1980); *Black v. Seaboard Systems Railroad*, 487 N.E.2d 468 (Ind. Ct. App. 1986).

In sum, the Court finds:

(1) A railroad track structure consists of rails, ties, ballast materials and roadbed;

(2) Federal regulations comprehensively cover the subject matter of rails, ties, ballast materials, roadbed and areas immediately adjacent thereto, and track structure drainage capability;

(3) 16 T.A.C. § 5.619 specifically requires construction of walkways adjacent to the roadbed, extending six feet from end of tie;

(4) The width, surface and slope requirements of section 5.619 would generally add to the FRA standards by requiring the railroads to strengthen or enlarge the roadbed beyond the FRA requirements;

(5) The width, surface and slope requirements of section 5.619 would require the extension of the roadbed

and construction of the walkway in a manner that is compatible with the existing roadbed and track structure, thus making them an integral part of the existing roadbed and track structure;

(6) Roadbed maintenance practices necessarily involve the use of heavy machinery which would mix the top layer of ballast rock with subballast materials with the result that crushed rock used for walkways would be mixed with other ballast material during ordinary roadbed maintenance;

(7) Walkways constructed by the specifications of section 5.619 would require materials that would, because of continuous rail traffic and regular maintenance, have the effect of weakening the track structure, impair drainage, and in time, weaken the roadbed itself; and

(8) The Federal Railroad Administration has regulated walkway conditions in Texas in at least two instances by investigating and citing improper walkway conditions in Southern Pacific Transportation Company and The Atchison, Topeka and Santa Fe Railway Company Texas yards.

D. Conclusions of Law

The Court makes the following conclusions of law. Plaintiffs have adequately demonstrated through all the evidence presented, through the opinion letter of the Chief Counsel of the FRA, through the policy statements of the FRA, through 49 C.F.R. 213, and through the practical involvement of the FRA in the inspection and maintenance of the area adjacent to the roadbed, that the FRA has acted to completely occupy the field of railway safety specifically related to the roadbed, track structure, and walkways.

As a result, the Court finds that federal regulations cover the subject matter of 16 T.A.C. § 5.619. Section 5.619 of the Texas Administrative Code is, therefore, preempted by total federal occupation of the subject matter.

III. PLAINTIFFS' SECOND CAUSE OF ACTION

In their second cause of action, the railroads assert that 16 T.A.C. § 5.619 is preempted for failure to address local safety hazards and for incompatibility with an existing federal law, rule, regulation, order or standard. Having found that section 5.619 is preempted by federal occupation of the subject matter, the Court will now address the second cause of action in the alternative. As stated, if federal regulations do not wholly occupy the subject matter, a State may adopt an additional or more stringent law, rule, regulation, order or standard covering the same subject matter only: (1) when necessary to eliminate or reduce an essentially local safety hazard; (2) when not incompatible with any federal law, rule, regulation, order or standard; and (3) when not creating an undue burden on interstate commerce. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

Whether a hazard is local or statewide is a question that was addressed by the House Report on the Railroad Safety Act of 1970, which states in pertinent part:

> The States will retain authority to regulate individual local problems or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering same subject matter.

H.R. REP. NO. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. AND AD. NEWS 4104, 4117.

The House Report indicates that safety hazards that are of statewide character were not meant to be included in the definition of purely "local" safety hazards. Several courts have also found that the "essentially local safety hazards" prong does not include the imposition of statewide standards. *See, e.g., National Association of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976); *Consolidated Rail Corp. v. Pennsylvania Public Utilities Commission*, 536 F.Supp. 653, 658 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983); *Atchison, Topeka and Santa Fe Railway v. Illinois Commerce Commission*, 453 F.Supp. 920, 926 (N.D. Ill. 1977).

Based on the Railroad Commission's admission in response to Plaintiffs' request for admission, section 5.619 admittedly has statewide application. The rule addresses rail safety matters, the condition and composition of railroad track structures, which have in the very least, have been addressed by a federal law, rule, regulation, order or standard. Accordingly, the Court makes the following findings of fact.

A. Findings of Fact

The Court finds that:

(1) 16 T.A.C. 5.619 is not a regulation that is necessary to eliminate or reduce an essentially local safety hazard;

(2) Based on the Court's findings related to the Plaintiffs' first cause of action, section 5.619 is not compatible with the FRA and its attendant regulations, which address the subject matter of 5.619, as it imposes additional and more stringent requirements on the track structure; more and different ballast materials; an enlargement and extension of the roadbed and ballast

sections; and would impede the drainage capability of the track structure.

B. Conclusions of Law

The Court finds that section 5.619 has failed the three part test of 49 U.S.C. § 434, in that it does not apply to an essentially local safety hazard, and in that it is incompatible with federal regulations addressing the subject matter of the rule. Accordingly, section 5.619 is preempted by a federal law, rule, regulation, order or standard, specifically, the FRSA and its attendant regulations, 49 C.F.R. 213.

IV. PLAINTIFFS' THIRD AND FOURTH CAUSES OF ACTION

The Fifth Circuit, on appeal, stated that, [i]f the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion." 833 F.2d at 576. Having found that section 5.619 is preempted on two alternative grounds, the Court finds it unnecessary to address Plaintiffs remaining causes of action. The Court finds that the remaining causes of action are moot and HEREBY DISMISSES causes of action three, four, and five.

ACCORDINGLY, IT IS ORDERED that 16 T.A.C. § 5.619 is preempted by federal regulatory occupation of the subject matter, and for failing the three part test contained in 49 U.S.C. § 434.

IT IS FURTHER ORDERED that the Defendant Railroad Commission of Texas, its agents, servants, employees and attorneys are PERMANENTLY ENJOINED from enforcing 16 T.A.C. § 5.619.

IT IS FURTHER ORDERED that all parties shall bear their own costs and attorney's fees related to this case.

SIGNED AND ENTERED this 5th day of September, 1990.

/s/ James R. Nowlin
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
WESTERN DISTRICT OF TEXAS

MISSOURI PACIFIC RAILROAD CO, ET AL — **JUDGMENT IN A CIVIL CASE**

V.

RAILROAD COMMISSION OF TEXAS, ET AL — CASE NUMBER: A-86-CA-406

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that causes of action three, four and five are dismissed.

ORDERED that 16 T.A.C. Section 5.619 is preempted by federal regulatory occupation of the subject matter, and for failing the three part test contained in 49 U.S.C. Section 434.

IT IS FURTHER ORDERED that the Defendant Railroad Commission of Texas, its agents, servants, employees and attorneys are PERMANENTLY ENJOINED from enforcing 16 T.A.C. Section 5.619.

IT IS FURTHER ORDERED that all parties shall bear their own costs and attorney fees related to this case.

9/6/90 CHARLES W. VAGNER
Dated Clerk

/S/
(By) Deputy Clerk

APPENDIX E

MISSOURI PACIFIC RAILROAD COMPANY, et al.
Plaintiffs-Appellees,

v.

RAILROAD COMMISSION OF TEXAS, et al.,
Defendants-Appellants.

No. 87-1151.

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1987.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, POLITZ, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Several railroads sought declaratory and injunctive relief against the Railroad Commission of Texas ("State" or "Commission") alleging that certain railroad safety regulations recently promulgated by the Commission were preempted by regulations of the Federal Railroad Administration ("FRA"), enforcing the Federal Railroad

Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*[8] The railroads alleged federal preemption and asserted *inter alia* that the Commission's regulations unduly burdened interstate commerce and deprived them of property without due process of law. The district court granted the railroads' motion for partial summary judgment, concluding that the State's safety equipment requirement, 16 T.A.C. 5.617, walkway requirement, 16 T.A.C. 5.619, and vegetation control provision, 16 T.A.C. 5.620(b), were each "specifically preempted by federal regulatory occupation of their subject matter." *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 653 F.Supp. 617, 628 (W.D. Tex. 1987). Alternatively, the district court concluded that the statewide character of *each* of the challenged regulations, 16 T.A.C. 5.616-5.620, indicated a failure to respond to "essentially local safety hazards" as required by 45 U.S.C. § 434. *Id.* at

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[8]Specifically, the railroads challenged the Commission's adoption of Tex. R.R. Comm'n, 16 Tex.Admin.Code 5.616-5.620 (hereinafter cited as "16 T.A.C. ___"). The following are summaries of each provision:

i) 5.616 requires railroads to file with the Commission copies of certain monthly reports filed with the FRA pursuant to 49 C.F.R. 228.19, copies of programs for periodic conduct of operational tests and inspections filed with the FRA pursuant to 49 C.F.R. 217.9, copies of programs for periodic instruction of employees filed with the FRA pursuant to 49 C.F.R. 217.11, and codes of operating rules, time tables, and time table special instructions;

ii) 5.617 requires operable fire extinguishers and first aid kits on each caboose and locomotive;

iii) 5.618 requires railroads to file with the Commission updated wayside detector maps, charts, or lists;

iv) 5.619 requires smooth, maintained, properly sloped walkways which are level with the tops of the ties along both sides of all tracks within railyards and the tracks adjacent hereto, in an effort to provide safer working conditions for employees working on or around the tracks;

v) 5.620 prohibits visual obstructions, including railroad equipment, signs, billboards, and excess vegetation, at public grade crossings.

627-28. The Commission appeals. We affirm in part, reverse in part, and remand.

I.

The Supreme Court has delineated certain principles by which we determine the preemptive scope of federal legislation or regulations under the Supremacy Clause. We "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The first inquiry is "whether Congress explicitly or implicitly declared that the states are prohibited from regulating" precise areas to which state regulations apply. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). However, "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a federal statute." *Id.* "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Finally, "'where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such [state] regulation is appropriate or approved pursuant to the policy of the statute,' states are not permitted to use their police power to enact such a regulation." *Ray*, 435 U.S. at 179, 98 S.Ct. at 1004-05. Although on reflection these guides are easier to state than to apply, by their compass we shall try to set our course.

Section 434 of the FRSA provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

By its terms, § 434 mandates national railroad safety standards "to the extent practicable." State regulation may, however, be interposed (1) where no federal standard has yet been adopted "covering the subject matter" of the state regulation or (2) to eliminate or reduce "an essentially local safety hazard."[9]

Legislative history does not enlighten our interpretation of how or what FRA regulations "cover the subject matter" of rail safety to the exclusion of continued state efforts.[10] Because the Act specifically preserves a

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[9]On appeal, the Commission does not seek to justify the challenged regulations under the second alternative, and we shall therefore not discuss it.

[10]Congress recognized that enactment of the FRSA would not instantaneously cover every safety hazard. *See* H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.CODE CONG. & AD.NEWS

regulatory position for the states, we are reluctant to jump to the conclusion that the Act evinced a "total preemptive intent." Compare *National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir.1976). Instead, we will attempt pragmatically to reconcile the scope of FRA regulations with the state regulations by considering whether in light of Congressional policy and FRA actions, a national rule, regulation, order or standard has been adopted "covering the subject matter" of the state regulations.

II.

A.

The Commission's walkway requirement poses the most difficult preemption issue. Section 5.619 defines a walkway as "a pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track." The required walkways are intended to provide a surface to support railroad employees working alongside railroad rolling equipment and track. The regulation establishes walkway surface, slope, and width specifications and requires walkways to be constructed along both sides of all tracks within rail yards.

Literally and figuratively, the walkways required by state regulations sit atop and adjoin the roadbed for which FRA has prescribed minimum specifications. The federal regulation governs roadbed, track geometry and track structure and specifically covers areas "adjacent to the

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4104, 4109 [hereinafter cited as House Report]. Therefore, as the House Report indicates, "existing state requirements [would] remain in effect until preempted by federal action[,]" *id.* at 4108, and "[o]nce the [FRA] has prescribed a uniform national standard, the State would no longer have authority to establish statewide standards with respect to rail safety." *Id.* at 4116-17.

roadbed" as well as track gauge, alignment, surface, ballast, drainage and component parts. 49 C.F.R. 213.31-213.143 (1986).

The Commission supports its regulation with a concededly appealing argument that FRA has not "covered the subject matter" of walkways because federal regulations do not mandate walkways. As the FRSA focuses on safety, whether or not a particular state regulation "covers the subject matter" of a federal regulation should be analyzed, according to the Commission, in terms of its precise safety concerns. This argument has found favor with several courts.[11] We reject this analysis as overly simplistic.

We have already observed that the Supreme Court in *Florida Lime & Avocado Growers, supra*, refused to resolve preemption issues by merely comparing the objectives of the federal and state regulations. If the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area. Federal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations "cover the subject matter."

Further, the scope of preemption under § 434 is informed by its introductory language directing the

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[11] *See, e.g., Southern Pacific Transp. Co. v. Public Util. Comm'n of California*, 647 F.Supp. 1220 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (*per curiam*); *Illinois Central Gulf R.R. Co. v. Tennessee Pub. Serv. Comm'n* 736 S.W.2d 112 (Tenn.Ct.App.) (permission to appeal denied August 31, 1987). *But Compare Norfolk & Western Ry. Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich. 1984); *Black v. Seaboard System R.R.*, 487 N.E. 2d 468 (Ind.Ct.App. 1986); *Black v. B & O Ry. Co.*, 398 N.E.2d 1361 (Ind.Ct.App. 1980).

establishment of national rail safety standards "to the extent practicable." It would be impracticable and inconsistent with this intent, if, assuming walkways are integrally related to track structure and composition, 50 states could establish individual walkway regulations in addition to the FRA standards.

Consequently, "covering the subject matter" must have a practical as well as a policy dimension under the FRSA. It must be "practicable" to permit some state regulation of railroad walkways consistent with FRA track structure and construction requirements. In drawing this conclusion, we find instructive the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). There, the Court invalidated a Washington state regulation that purported to set minimum safety standards for oil tankers intending to traverse Puget Sound. The Court held that the Federal Tank Vessel Act and its regulatory implementation preempted "state efforts to mandate different or higher design requirements" for oil tankers. *Id.* at 166, 98 S.Ct. at 998 (foot-note omitted). The Court's interpretation of the applicable federal laws led it to conclude that "Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulation ... would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard." *Id.* at 163-64, 98 S.Ct. at 997. The Court distinguished cases in which it had upheld state regulations that affected federally registered vessels, where there was no overlap between federal law and state regulations having a different and non-conflicting purpose and implementation. *See, e.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

It likewise appears in this case that the Commission may seek to enforce "different or higher standards" of track construction by superimposing the walkway requirement on

federal track geometry and structure regulations. This would be the case if, from a practical standpoint, the width, surface and slope requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements.[12] If the walkway regulation has this effect, we hold that the federal regulation has "covered the subject matter" of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards "to the extent practicable."

Unlike the district court, however, we are unable to determine from the summary judgment record whether such an overlap exists. The affidavit of Michael McGinley, a railroad engineer, submitted on behalf of the railroads, implies that design, construction and maintenance standards for walkways and railroad track and roadbed are as inseparable as peanut butter from a slice of bread. The Commission, however, submitted a controverting affidavit. The district court perfunctorily dismissed the controverting affidavit, notwithstanding that the Commission's witness purported to contradict McGinley on virtually every salient point he made. We believe there is a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations. The trial court should not have determined between these experts' conflicting views on affidavits alone. *Anderson v. Liberty*

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[12]The distinction we seek to draw between a functionally overlapping state regulation and one not "covered by the subject matter" of an FRA regulation may be illustrated hypothetically. If the Commission sought to regulate walkway safety by requiring railroads to post signs wherever the walkways were slippery or obstructed, we would not find this preempted. Not only does this hypothetical regulation address a hazard not specifically covered by FRA regulations, *see* discussion *infra*, but its implementation in no way adds to the FRA's basic track construction regulations or impairs FRA's superintendence of that field.

Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). We therefore REMAND this issue for trial.

In so doing, we also reject the railroads' contention that the FRA, by declining to promulgate various walkway regulations in the past, has specifically intended to "cover the subject matter" of walkways so as to preempt state regulations. Here the railroads must rely on the principle stated in *Ray* that, "where failure of ... federal officials affirmatively to exercise their full authority *takes on the character of a ruling that no such regulation is appropriate* or approved pursuant to the policy of the statute, states are not permitted to use their police power to enact such regulation." 435 U.S. at 178, 98 S.Ct. at 1004 (quoting *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947)) (emphasis added). *See also Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983).

We agree with the district court in *Southern Pacific Trans. Co. v. Public Util. Comm'n of California*, 647 F.Supp. 1220 (N.D.Cal.1986), which found no explicit or implied preemptive expression by FRA in its previous walkway ventures. *Southern Pacific* summarizes two of the agency actions succinctly.

> When the FRA decided not to adopt proposed regulation 213.39 relating to obstacles near tracks, it did not do so because it concluded that the regulation was not justified. Rather, the agency decided that the regulation was too vague to be effective. 36 Fed.Reg. 20, 336 (1971). When the FRA decided not to adopt a regulation requiring walkways on trestles and bridges, its reasons related specifically to conditions affecting those structures. 42 Fed.Reg. 22,185 (1977). It did not conclude that a general requirement of walkways was not justified.

647 F.Supp. at 1226. Finally, FRA's 1978 Policy Statement delineating the respective responsibilities of FRA and OSHA over railroad safety matters, while asserting that OSHA should not regulate "walkways beside the track in yards or along the right-of-way," nevertheless stated that "FRA *will determine* the need for and feasibility of general standards related to such surfaces." 43 Fed.Reg. 10,582, 10,587 (1978) (emphasis added).[13] This statement in no way suggests that the FRA has decided as a matter of policy that walkway regulations must be national in character and must preempt state action. The policymaker appears to be saying that "we haven't looked at walkways yet," rather than, as *Ray* requires, "we haven't done anything because we have determined it is appropriate to do nothing." From this standpoint, the FRA's statement implies that unless walkway regulations are otherwise preempted, e.g., by FRA track and roadbed regulations that "cover the subject matter," § 434 could authorize state regulation until the FRA acts.

If the district court determines that the state walkway regulation is not preempted under the foregoing standard, it must then consider the railroads' remaining arguments concerning the walkway regulation not addressed in its original opinion.

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[13]Our court's reliance in *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984), on the FRA Policy Statement does not bear on this case. The sole issue in *Velasquez* was whether OSHA or FRA regulations applied to a walkway beside a track, for purposes of a personal injury action jury instruction. To hold, as *Velasquez* did, that the FRA Policy Statement prevented plaintiff from securing an instruction on OSHA regulations, does not control the issue of the exercise of FRA jurisdiction to the exclusion of state regulation under § 434.

B.

But for one facet of its ruling, the district court properly concluded that the Locomotive Boiler Inspection Act of 1911, 45 U.S.C. § 22 *et seq.*, wholly occupies the field of regulation of locomotive equipment to the exclusion of 16 T.A.C. 5.617. *See Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S.Ct. 207, 210, 71 L.Ed. 432 (1926); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F.Supp. 653, 655 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed. 280 (1983). In *Napier* the Supreme Court stated:

> We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements by the states are precluded, however comendable or however different their purpose.

272 U.S. at 613, 47 S.Ct. at 210 (citations omitted). The district court apparently overlooked, however, 16 T.A.C. 5.617's requirement that fire extinguishers and first aid kits be placed not only on locomotives but on cabooses as well. Cabooses are not within the purview of the Locomotive Boiler Inspection Act, and we find no reason to hold 5.617 preempted to the extent of its application to cabooses. Moreover, the Commission's severability clause applicable to these regulations, 16 T.A.C. 5.621, permits enforcement of 5.617 only in regard to cabooses. We thus affirm the validity of 5.617 as applied to cabooses as a proper exercise of the state's police power.[14]

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[14]Contrary to the Commission's assertion, *Southern Ry. Co. v. Lundsford*, 297 U.S. 398, 56 S.Ct. 504, 80 L.Ed. 740 (1936), does not stand for the proposition that under the Locomotive Boiler Inspection

C.

Turning to 16 T.A.C. 5.620, we reject the district court's finding that federal regulations preempt the state vegetation control provision. The FRA regulations provide for vegetation control provide:

> Vegetation on railroad property which is *on or immediately adjacent to roadbed* must be controlled so that it does not--
> (a) Become a fire hazard to track-carrying structures;
> (b) Obstruct visibility of railroad signs and signals;
> (c) Interfere with railroad employees performing normal trackside duties;
> (d) Prevent proper functioning of signal and communication lines; or
> (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

Act state attempts to regulate are preempted only to the extent they prescribe "integral or essential" equipment of a complete locomotive. *Lundsford* held that "mere experimental devices which do not increase the peril, but may prove helpful in an emergency" are not "parts or appurtenances" whose lack of maintenance will subject the railroad to absolute tort liability under 45 U.S.C. § 23. 297 U.S. at 402, 56 S.Ct. at 506. State attempts to prescribe *any* locomotive safety equipment must necessarily fail. *Accord, Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) ("*Lundsford* in no way affects our holding that the Boiler Inspection Act preempts any state regulation of locomotive equipment.") Moreover, state court cases upon which appellant relies as establishing a contrary proposition, *see Norfolk & W. Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 121, 413 A.2d 1037, 1043 (1980); *State v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 79 Wash.2d 288, 292-94, 484 P.2d 1146, 1149, *appeal dismissed*, 404 U.S. 804, 92 S.Ct. 108, 30 L.Ed. 36 (1971), are unpersuasive and contrary to federal policy.

49 C.F.R. 213.37 (1986) (emphasis added). The state, in an effort to prevent visual obstruction to vehicular highway traffic promulgated 16 T.A.C. 5.620(b), which provides:

> Each railroad corporation shall control vegetation on its right-of-way (except for the roadbed in areas immediately adjacent thereto) for a distance of 500 feet each way from every public grade crossing so that it does not obscure the view of approaching trains to vehicular road traffic.

The district court held that the entire right-of-way is an "area immediately adjacent to the roadbed" and on this basis concluded that 16 T.A.C. 5.620(b) "covered the same subject matter" for purposes of 45 U.S.C. § 434. 653 F.Supp. at 626. We disagree. The area "immediately adjacent to the roadbed" abuts the roadbed. Right-of-way property can and often does extend several yards from the roadbed, however. Consequently, not all right-of-way property lies "immediately adjacent to the roadbed," and the federal regulation does not "cover the subject matter" of vegetation that is on the right-of-way but not immediately next to the roadbed.

Additionally, there is no pragmatic overlap of the federal and state regulations such as we found with respect to walkway regulations. The state regulation was designed to apply where the federal requirements end. The Commission's preamble affirms that 5.620(b) "specifically excludes applicability to vegetation on the roadbed and immediately adjacent thereto. ...[T]he commission's section takes effect where the federal rule leaves off. The commission believes that compliance with both rules will ensure a clear line-of-sight adequate to protect vehicle occupants." 11 Tex.Reg. 2741 (June 13, 1986). The Commission drafted its requirement in response to a demonstrable safety need reflected in a 1985 study conducted by the National Transportation Safety Board.

The study indicated that in recent train collisions with motor vehicles, obstructions, particularly vegetation obstructions, limited the drivers' views along the railroad. There are no federal standards for minimum sight distance at grade crossings, nor does enforcement of 5.620(b) impair or interfere with FRA regulation 213.37. Consequently, because 5.620(b) does not govern vegetation control on the roadbed and area immediately adjacent thereto, we hold that the state vegetation control requirement is not preempted by § 434 or FRA regulation.

D.

In its alternative holding that each of the challenged regulations failed to address an "essentially local safety hazard", the district court implicitly invalidated the reporting requirements of 16 T.A.C. 5.616 and 5.618. The court apparently believed obligations "covering the same subject matter" had already been enacted by FRA. We reject this conclusion.

The FRSA provides that when a state agency satisfies the statutory certification process, "[a] state may participate in carrying out investigative and surveillance activities in connection with any rule, regulation, order, or standard prescribed by the Secretary...." 45 U.S.C. § 435(a). The House Report on the bill recognized and explicitly preserved the state's participation in enforcement of the federal scheme as a vital element in administration of the Act. House Report at 4109. Indeed, the FRA's regulations indicate that states provide an "enhanced investigative and surveillance capability," 49 C.F.R. 212.101 (1986), and contemplate a coordinated investigative and surveillance effort between the states and FRA. 49 C.F.R. 212.101 (1986).

Consistent with this enforcement scheme, the Commission adopted certain regulations enabling it to

contribute optimally, by requiring simultaneous filing with the Commission of documents required by the FRA. Such reporting regulations do not offend the Act. *See Coleman*, 542 F.2d at 15. Moreover, we do not find the Commission's additional reporting requirements proscribed under the Act. In *Coleman*, the Third Circuit approved contemporaneous filing of copies of FRA-mandated reports with the state, but it also held that the FRA regulation there specifically preempted states from prescribing additional "accident/incident" reporting requirements. *See* 49 C.F.R. 225.1. Here, by contrast, the Commission regulations do not require the railroads to create any additional reports. The Commission only requires the filing of documents such as maps and charts already maintained by the companies. *See* note 1 *supra*. Given the overall surveillance scheme contemplated by the FRSA, federal proscription of the Commission's reporting requirements in 16 T.A.C. 5.616 and 5.618 is not warranted.

III.

We summarize our holding as follows: We reverse the district court's conclusion that the Commission's walkway requirement, 16 T.A.C. 5.619, is preempted by federal regulation covering the "same subject matter," and we remand this issue for further proceedings. We affirm the district court's conclusion that the Commission's attempt to regulate safety equipment on locomotives is preempted by the Locomotive Boiler Inspection Act of 1911; however, we reverse the district court's conclusion that the requirements of 16 T.A.C. 5.617 concerning safety equipment on railroad cabooses is preempted. Third, we reverse the conclusion that the vegetation control provision, 16 T.A.C. 5.620(b), is preempted. Fourth, we reject the court's implicit holding that the filing requirements of 16 T.A.C. 5.616 and 5.618 are preempted.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX F

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF
the STATE OF CALIFORNIA, et al.,

Defendants.

No. C-86-2480-WWS.

United States District Court,
N.D. California.

Nov. 3, 1986.

MEMORANDUM OF OPINION AND ORDER

SCHWARZER, District Judge.

This is an action brought by Southern Pacific Transportation Company ("Southern Pacific") for declaratory and injunctive relief against General Orders Nos. 26-D and 118 issued by defendant Public Utilities Commission of the State of California ("CPUC"). Southern Pacific contends that the orders are preempted by the Federal Railroad Safety Act ("FRSA") and constitute an unreasonable burden on interstate commerce. CPUC has moved for summary judgment.

STATEMENT OF FACTS

In 1948, CPUC adopted General Order No. 26-D. This order prescribes the minimum distances (clearances) railroads must maintain between freight cars and structures located above and beside railroad tracks and between parallel tracks. The part of the order challenged here provides that, with certain exceptions, "[t]he minimum distance between center lines of parallel standard gauge tracks shall be fourteen (14) feet." The order applies to tracks constructed or reconstructed after its effective date.

General Order No. 118 was adopted in 1963. That order requires railroads to maintain a two-foot wide continuous walkway on each side of their tracks. The order provides that "walkways shall provide a reasonable, regular surface with gradual slope not to exceed one inch to eight inches."

The purpose of both rules is to provide railroad employees with a safe working environment. General Order No. 26-D is designed to afford employees the minimum workspace necessary to avoid being crushed between trains moving on parallel tracks. General Order No. 118 is designed to provide employees with safe footing while working beside tracks.

Southern Pacific contends that the General Orders impose extraordinary costs and achieve only minimal safety benefits. Employees of Southern Pacific have submitted declarations stating that the company has experienced severe financial difficulties in recent years and that, as a result, the company lacks adequate maintenance funds. One employee states that the General Orders force Southern Pacific to divert scarce financial resources from important maintenance projects in other states to work in California which will result in little, if any, safety benefit to employees.

In addition, Southern Pacific challenges a specific decision of the CPUC finding that the company's Fresno switching yard has undergone reconstruction and ordering Southern Pacific to bring the yard into compliance with General Order No. 26-D. Because Southern Pacific cannot afford the $4,000,000 it would allegedly need to spend in order to bring the yard into compliance, it has ceased operations on thirteen tracks in the yard. According to Southern Pacific's General manager for the Southern Region, this shut-down has resulted in delays of one day in some of the traffic which previously went through the yard.

CPUC has introduced substantial evidence that the General Orders provide a safer working environment for railroad employees. CPUC's Assistant Transportation Supervisor has submitted a declaration which explains in detail why the orders provide the minimum space necessary for employees to perform their job functions safely. He describes fatal accidents that probably would have been avoided if tracks had complied with General Order No. 26-D's clearance requirements. And he cites statistics which demonstrate that poor footing near tracks is a major source of accidents. Moreover, CPUC has submitted evidence that tends to contradict Southern Pacific's contentions that its financial situation is precarious and that the Fresno Yard decision causes delays.

In 1970, Congress adopted the FRSA, Pub.L. No. 91-458, 84 STAT.971 (1970) (codified as amended at 45 U.S.C.A. §§ 421-444 (West 1972 & Supp. 1986)). The purpose of the FRSA is "to promote safety in all areas of railroad operations." 45 U.S.C.A. § 421 (West 1972). In order to accomplish that purpose, the act authorizes the Secretary of Transportation "to prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* § 431. The Secretary of Transportation has delegated that responsibility to the

Federal Railroad Administration ("FRA"). 49 C.F.R. § 1.49(m)(1985).

The FRSA declares that railroad safety regulations "shall be nationally uniform to the extent practicable." 45 U.S.C.A. § 434 (West 1972). The act, however, allows state regulation of railroad safety in certain circumstances:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Id.

Pursuant to its delegated authority, the FRA has adopted a set of "Track Safety Standards." 49 C.F.R. §§ 213.1-.241 (1985). These standards set forth requirements for track geometry, structure, and inspections. *Id.* They also establish two requirements for the roadbed supporting railroad tracks. Roadbeds must have adequate drainage, and vegetation on or near roadbeds must be controlled so that it does not obstruct visibility or interfere with railroad employees performing their duties. *Id.* § 213.37.

Between 1971 and 1978, the FRA pursued three rule making proceedings relating to safety concerns addressed by General Orders Nos. 26-D and 118. In its initial Notice of

Proposed Rule Making (NPRM), the FRA proposed to adopt § 213.39 as part of its track safety standards. The proposed section provided: "If an object or hazardous condition within 10 feet of the center line of track impedes the safe passage of equipment or prevents railroad employees from safely performing their duties, the owner of the track shall remove the object or correct the hazardous condition or give appropriate warning notification." 36 Fed.Reg 11,974, 11,976 (1971). After receiving comments on the NPRM, the FRA concluded that § 213.39 should not be adopted, "because its language was ... too vague to constitute an effective safety standard." 36 Fed.Reg. 20,336, 20,336 (1971).

In 1976, the FRA published an advance NPRM asking for comments on the question whether the agency should adopt regulations requiring walkways on trestles and bridges. 41 Fed.Reg. 50,302 (1976). In 1977 the FRA decided that it would not adopt such a regulation. 42 Fed.Reg. 22,184 (1977). The agency determined that the benefits of a nationwide requirement of walkways on those structures would be outweighed by the costs of the regulation. *Id.* at 22,185. The agency stated that "if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a state agency that is in a better position to assess local need is the more appropriate response." *Id.*

Finally, a 1975 advance NPRM announced the FRA's intention to adopt railroad occupational safety and health standards. 40 Fed.Reg. 10,693 (1975). It was contemplated that the standards would include regulations covering "track, roadbed, track appliances, and related devices." *Id.* After receiving comments, the FRA announced that it would adopt a comprehensive code of occupational safety and health regulations by issuing a series of NPRMs covering discreet subjects. 41 Fed.Reg. 29,153 (1976). The first NPRM in the series proposed

regulations dealing with fire prevention, environmental controls, and means of egress to buildings used by railroad employees. *Id.*

In 1978, the FRA issued a "Policy Statement," which terminated this rule making proceeding and attempted to define "the relationship between the respective jurisdictions of the FRA and" the Occupational Safety and Health Administration of the Department of Labor (OSHA). 43 Fed.Reg. 10,583, 10,584 (1978). The FRA determined that a comprehensive code of occupational safety and health regulations directed specifically at railroads would unnecessarily intrude into areas adequately regulated by OSHA. *Id.* at 10,585, 10,587. At the same time, the FRA concluded that the safety of "railroad operations," which it defined as "the movement of equipment over the rails," should be "the responsibility of a single agency." The statement therefore set forth areas of railroad operations to which OSHA regulations should not apply. The FRA specifically determined that OSHA regulations on walking and working surfaces should not apply to "walkways beside the tracks in yards or along the right-of-way." *Id.* at 10,587. The Policy Statement indicated that the "FRA will determine the need for and feasibility of general standards related to such surfaces, keeping in mind the requirement of proper clearances." *Id.*

DISCUSSION

A. *Preemption*

The FRSA permits state regulation of railroad safety in two circumstances. First, State regulation is permitted as long as there is no federal rule, regulation, standard, or order covering the same subject matter. 45 U.S.C.A. § 434 (West 1972). Second, state regulation which does cover the same subject matter as federal regulation is permitted as long as it (1) is necessary to eliminate an essentially local

safety hazard, (2) is not incompatible with federal regulations, and (3) does not create an undue burden on interstate commerce. *Id.* The CPUC acknowledges that the General Orders are statewide regulations which do not address an "essentially local safety hazard." The sole question with regard to preemption is therefore whether federal regulations or standards cover the same subject matter.

Southern Pacific advances three arguments in support of its contention that the General Orders are preempted. Its first argument is that the FRA's existing track safety regulations cover the same subject matter as the General Orders. None of the FRA standards, however, addresses the subject of track clearance covered by General Order No. 26-D. The FRA track safety regulations set forth requirements for individual tracks. They cover, for example, the subject of rail gage, which is the distance between rails in a track. 49 C.F.R. § 213.53(1985). But they do not establish requirements for the distance between tracks.

Southern Pacific's contention that existing federal regulations preempt the CPUC's walkway requirements is somewhat more persuasive, but also ultimately unavailing. Southern Pacific has submitted evidence that the requirement of a two-foot wide continuous walkway requires extension of the ballast or subgrade. The ballast and subgrade are a track's supporting structure. Federal regulations set forth requirements for that structure. The FRA regulation on ballast require that it:

> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads

> imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track cross-level, surface and alignment.

49 C.F.R. § 213.103(1985). General Order No. 118 thus affects an area of railroad operations covered by federal regulations. Southern Pacific argues that the order is preempted, reasoning that if state and federal regulations affect the same area of railroad operations, then they cover the same subject matter under § 434. But the legislative history of the FRSA indicates that Congress's primary purpose in enacting that statute was "to promote safety in all areas of railroad operations." H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Ad.News 4104 [cited as House Report]; *see also* 45 U.S.C.A. § 421 (West 1972). Congress's concern extended to the safety of employees engaged in railroad operations. House Report at 4106. Read in the light of that history, § 434 manifests an intent to avoid gaps in safety regulations by allowing state regulation until federal standards are adopted. State and federal regulations therefore cannot be held to cover the same subject matter unless they address the same safety concerns.

FRA regulations and General Order No. 118 do not cover the same subject matter under this interpretation. The ballast regulations relied upon by SP are designed to insure that tracks have adequate support. The regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. *See* 49 C.F.R. § 213.37 (1985). No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks.

The conclusion that existing FRA regulations do not cover the same subject matter as the General Orders is consistent with circuit court opinions applying § 434 to other situations. In *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir.1976), the court held that a state requirement that railroads file monthly accident reports was preempted by an FRA regulation which also required monthly reports. The Court indicated, however, that the state could require railroads to provide immediate notification of accidents. *Id.* at 15. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973), the court held that a city had no jurisdiction to require correction of track conditions which had allegedly caused derailments. The FRA's track safety standards addressed precisely the safety concerns which were the subject of the city's actions. *Id.* at 1112.

Southern Pacific's second argument is that the FRA's rejection of safety standards addressing the subject of employee safety near railroad tracks preempts the General Orders. The general principle for which Southern Pacific argues is sound. Under the FRSA the rejection as well adoption of standards can preempt state regulation. In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), the Ninth Circuit held that the Boiler Inspection Act (BIA) preempted a state requirement that locomotives be equipped with strobe or oscillating lights. *Id.* at 1152-53. The court reasoned that the BIA occupied the field of locomotive equipment regulation and that the FRSA had not altered the BIA's preemptive effect. *Id.* With respect to the FRSA, the court stated that it "preempts only those state laws where the federal government has acted with respect to the same 'subject matter.'" *Id.* It went on to state:

> The reasons we have given thus far suffice to determine this aspect of the case, but we note actions recently taken by the Federal Railroad Administration (FRA). Over a five year period, the FRA studied the effectiveness of strobe and oscillating lights, and, at least at this point, it "has concluded that the information in the docket does not support the proposition that alerting lights are effective in reducing the incidents of grade-crossing accidents. Without that support, a Federal regulatory requirement that railroads equip their locomotives with an alerting light is not justified." 48 Fed.Reg. 20,257 (May 5, 1983). Under the statutory scheme we are here considering, where the FRA has rejected the requirement of strobe or oscillating lights, a state may not require them. "'[W]here failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. [151] at 178, 98 S.Ct. [988] at 1004 [55 L.Ed.2d 179] (1978) (quoting *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947). The recent action of the FRA is support for the conclusion that the subject has been preempted by administrative action as of this date ....

Id. at 1153-54. The *Marshall* dictum thus indicates that if after due consideration the FRA determines that a particular regulation is not justified, that determination has the same preemptive effect as the adoption of a regulation.

None of the instances in which the FRA has rejected regulations relating to employees' trackside working environment meet this standard. When the FRA decided not to adopt proposed regulation 213.39 relating to obstacles near tracks, it did not do so because it concluded that the regulation was not justified. Rather, the agency decided that the regulation was too vague to be effective. 36 Fed.Reg. 20,336, 20,336 (1971). When the FRA decided not to adopt a regulation requiring walkways on trestles and bridges, its reasons related specifically to conditions affecting those structures. 42 Fed.Reg. 22,185 (1977). It did not conclude that a general requirement of walkways was not justified. Finally, in deciding not to adopt a comprehensive set of railroad occupational safety and health standards, the FRA came to no conclusion regarding the merits of clearance or walkway requirements. *See* 43 Fed.Reg. 10,583 (1978).

Southern Pacific's final argument in favor of preemption is that in the 1978 Policy Statement the FRA assumed jurisdiction over subjects covered by the General Orders. This argument is unpersuasive for several reasons. First, the Policy Statement attempted to delineate the respective jurisdictions of the FRA and OSHA. It did not purport to limit state jurisdiction. *See Burlington Northern Railroad Co. v. Nebraska*, 83-L-423, slip. op. at 5 (D.Neb. May 10, 1985), *rev'd on other grounds*, 802 F.2d 994 (8th Cir.1986). Second, the conclusion that the FRA's jurisdiction extended to walkways beside tracks, *see* 43 Fed.Reg. 10,583, 10,587 (1978), did not follow notice and comment rule making proceedings, as required by the statute, 45 U.S.C.A. § 431(b) (West 1972). Third, the Policy Statement indicated that the FRA would determine the need for walkway regulations in the future, 43 Fed.Reg. 10,583, 10,587 (1978); the FRA thus did not claim to have adopted regulations covering that subject. Finally, the Policy Statement does not mention clearances. Regardless

of its effect on walkway regulations, it therefore cannot be said to preempt clearance standards.

Southern Pacific relies on two decisions holding that the FRA has preempted state walkway regulations. *Norfolk Western Railway Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich.1984) (bench opinion); *Black v. Seaboard System Railroad*, 487 N.E.2d 468 (Ind.Ct.App.1986). These decisions are distinguishable but in any event rest on the arguments that the Court has here found to be without merit. The same is true of letters from FRA's General Counsel, submitted by Southern Pacific, offering his opinion that General orders Nos. 26-D and 118 are preempted. For the reasons stated in this opinion, the Court declines to follow these authorities.

B. *Commerce Clause*

While the commerce clause may be a restriction on state power to legislate, it is a source of authority for Congressional action. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983). Thus, "[w]here state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause, even if it interferes with interstate commerce." *Id.*

To the extent General Orders Nos. 26-D and 118 are authorized by § 434, they are not subject to scrutiny under the commerce clause. Section 434 authorizes state regulation of railroad safety in two circumstances. First, a state regulation is authorized if it addresses a subject not covered by federal regulations. Second, a state regulation which is more stringent than federal standards is allowed if it addresses an essentially local safety concern and does not unduly burden interstate commerce. What is significant about the statutory scheme is that absence of burden on commerce is a specified condition to state authority to

regulate only with respect to regulations that are more stringent than federal rules. Congress chose not to place this condition in the provision authorizing state regulations that address subjects not covered by federal regulations. Since the present orders are authorized under that provision whether they impose a burden on commerce is irrelevant.

Even if validity of the General Orders were assessed without reference to § 434 the result would be the same. The standard applicable to state regulations affecting interstate commerce is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *See also, Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Board*, 709 F.2d 1250 (9th Cir.1983), *cf. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (striking down a state prohibition against the use of a 65-foot double trailers on Iowa highways, subject to certain exceptions).

Southern Pacific's argument that the General Orders violate the commerce clause under this standard fails for two reasons. First, Southern Pacific has not shown that the orders burden commerce. Demonstrating that state regulations impose substantial costs on interstate operations is not sufficient to establish a burden calling for balancing under *Pike. Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526, 79 S.Ct. 962, 966, 3 L.Ed.2d 1003 (1959); *Burlington Northern Railroad Co. v. Department of Public Service*, 763 F.2d 1106, 1114 (9th Cir.1985). Rather, a challenger to a state regulation must show that it "impedes substantially the free flow of commerce from state to state." *Burlington*, 763 F.2d at 1114. Southern Pacific has failed to do so.

Second, the CPUC has introduced substantial evidence that the General Orders provide a safer working environment for railroad employees. Southern Pacific has not raised a genuine issue of fact as to whether safety benefits result from the orders. Thus even if the orders were not authorized by Congress, there is no evidence from which it could be found that any burden the orders impose is clearly excessive in relation to the benefits they produce.

For the reasons stated, the motion of CPUC for summary judgment will be granted.

IT IS SO ORDERED.

APPENDIX G

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,

Plaintiff-Appellant,

Railway Labor Executives' Association,

Intervenor-Appellee,

v.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA; et al.,

Defendants-Appellees.

No. 86-2983

United States Court of Appeals,

Ninth Circuit

Argued and Submitted June 11, 1987.

Decided June 30, 1987.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN, BEEZER and THOMPSON, Circuit Judges.

PER CURIAM:

We affirm the district court's grant of summary judgment in favor of the California Public Utilities Commission set forth in the district court's opinion in *Southern Pacific Transp. Co. v. Public Utilities Comm'n*, 647 F.Supp. 1220 (N.D. Cal. 1986). We note that the district court failed to recognize that the topic of railtrack clearances had been mentioned in an administrative statement issued by the Federal Railroad Administration in 1978. This oversight, however, does not detract from the soundness of the district court's reasoning nor its conclusion that California's track clearance and walkway regulations have not been preempted by federal rule, regulation, order or standard covering the same subject matter as these state requirements. 45 U.S.C. § 434. This conclusion of the district court is correct.

Because there has been no federal preemption of California's track clearance and walkway requirements, we do not reach the questions whether these requirements are necessary to eliminate or reduce an essentially local safety hazard, are not incompatible with any federal law, rule, regulation, order or standard, and do not create an undue burden on interstate commerce. *See id.*

AFFIRMED.

APPENDIX H

§5.619. WALKWAYS REQUIREMENTS

(a) Definitions. The following words or terms, when used in this section, shall have the following meanings.

(1) Walkway--A pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform duties associated with that track.

(2) Main track--A track, other than an auxiliary track, extending through yards and between stations and upon which trains or engines are operated and movements are authorized by block signals, time table, or train order, or the use of which is governed by rules or special instructions.

(3) Siding--A track auxiliary to the main track for meeting or passing trains.

(4) Yard--A system of tracks used for making up trains, storing of cars, and other purposes. Such tracks may include, but are not limited to, rolling stock repair and classification tracks. Main tracks and sidings are excluded from the definition of yard switching tracks except at those locations where either the main track or the siding is used as an integral component of the system of tracks used for classification of railroad cars or for making up trains.

(5) Classification tracks--A system of tracks, joined by a lead or ladder track at one or both ends, used for the sorting and arranging of cars in order according to destination or according to the railroad's instructions.

(6) Lead or ladder track--A track on which is located a series of closely spaced turnouts providing access to a system of classification tracks.

(7) Switch--A track structure used to divert railroad rolling stock from one track to another.

(b) Surface of walkways.

(1) Walkways shall have a reasonably smooth surface and shall be maintained in a safe condition, clear of vegetation, debris, standing water, and other obstructions.

(2) Walkways shall be surfaced with crushed materials not to exceed 1 1/2 inches in size or with asphalt, concrete, secured planking, grating, or similar material.

(3) Walkways shall be constructed and maintained in such a manner that the elevation of their surfaces are approximately level with the tops of the ties, but not higher than the top of the rails.

(c) Slope of walkways.

(1) Walkways shall not have a slope in excess of one inch of elevation per each eight inches of horizontal length in any direction.

(2) Excess slope is permissible where the proximity of adjacent tracks so dictates so long as the slope between adjacent tracks is constant.

(3) Excess slope is permissible at locations where a vehicle or pedestrian-way intersects a walkway unless the commission, after investigation, determines that

safety requires the slope prescribed by subsection (d)(1) of this section.

(d) Width of walkways. Walkways shall be constructed to a minimum width of six feet, as measured from the outside end of the crossties.

(e) Where walkways shall be required. Walkways shall be located along both sides of all tracks within yards and tracks adjacent thereto so as to include all points contiguous to yards where railroad employees normally work on the ground. Walkways conforming to this standard shall be constructed and maintained throughout the area where mechanical inspections routinely occur.

(f) Effective dates for walkways construction.

(1) Except as approved by the commission, no railroad track which is subject to walkway requirements and constructed after the effective date of this section shall be placed in service until walkways have been provided that are in compliance with the applicable standard found in this section and notice thereof is given to the commission.

(2) For existing trackage which is subject to walkway requirements, walkways shall be constructed no later than one year after the effective date of this section and maintained thereafter.

(g) Exemptions to walkway requirements. Walkway requirements do not apply:

(1) during periods of new track construction, maintenance, repair, renewal, reconstruction, or alteration of a right-of-way or track, where obstruction or removal of a walkway is unavoidable, provided affected railroad personnel are given prior written notice, and

provided walkways are returned to standard upon completion of the work;

(2) during periods of heavy rains or snow, derailments, rock and earth slides, washouts, and like unforeseen conditions beyond the control of the railroad corporation when the walkway is impaired or destroyed, including a reasonable time to permit necessary restoration; and

(3) at locations where the commission has authorized an impairment of standard clearance or where a permanent obstruction exists or has been placed or constructed alongside a track in such a location as to block the walkway partially or to prevent construction of the applicable standard walkway, provided that the available space between the impairment or obstruction and the track meets the applicable walkway standard in every respect except as prevented by the authorized impairment or obstruction.

(h) Applicability of requirements.

(1) Walkway requirements apply to all railroad corporations operation in the State of Texas.

(2) The commission may order walkways to be constructed and maintained along one or both sides of any railroad track where not otherwise required by these sections. Such walkways may be ordered when the commission determines, after opportunity for hearing, that local conditions present an undue safety risk that can be prevented or lessened by requiring a walkway.

(i) Variances for walkways.

(1) A railroad corporation may apply for a variance from the walkway requirements prescribed by this

section on a form to be prescribed by the commission. Such application shall be governed by the general and special rules of practice and procedure before the Transportation Division of the Railroad Commission of Texas, as they may be from time to time amended.

(2) The commission may approve such application for variance for good cause shown.

Supreme Court, U.S.
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No. 91-1423

In The

Supreme Court of the United States

October Term, 1991

RAILROAD COMMISSION OF TEXAS, *et al.*,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. § 434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, in finding that 16 T.A.C. § 5.619 is pre-empted?

LIST OF PARTIES

Petitioners:

Railroad Commission of Texas

Its Members: James E. Nugent
Robert Krueger
Lena Guerrero

Respondents:

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly-traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

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No. 91-1423

In The

Supreme Court of the United States

October Term, 1991

RAILROAD COMMISSION OF TEXAS, *et al.*,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On December 6, 1985, the Railroad Commission of Texas published a set of proposed rules, identified as 16 T.A.C. §§ 5.616-5.621. No administrative hearing was held, but public comments were solicited and received, including submission of

voluminous material and briefing by the respondents. On June 3, 1986, the rules with some modifications were adopted by the Railroad Commission of Texas.

On July 22, 1986, respondents filed their complaint in the United States District Court, Western District of Texas, Austin Division, complaining of the adopted rules. The railroads' complaint listed seven distinct causes of action — three based upon federal pre-emption, two based upon constitutional improprieties and two based upon state law violations. The complaint was answered in due course by petitioners.

On October 1, 1986, the railroads filed a motion for partial summary judgment. The motion for partial summary judgment addressed specifically the three pre-emption causes of action and one of the causes based upon constitutional improprieties. On November 5, 1986, the Railroad Comission filed its motion for dismissal and for summary judgment.

On January 27, 1987, the District Court granted in part the railroads' motion for partial summary judgment on the ground of pre-emption by federal law and regulation. *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas,* 653 F. Supp. 617 (W.D. Texas 1987). The Railroad Commission appealed the January 27, 1987 judgment; the Fifth Circuit's decision was rendered on December 10, 1987, and published as *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas,* 833 F.2d 570 (5th Cir. 1987). A copy of that decision (MOPAC I) is Appendix E to petitioners' petition for writ of certiorari.

The MOPAC I decision reversed in part, affirmed in part and remanded in part. Specifically regarding 16 T.A.C. § 5.619, the only state rule still involved in this case, the Fifth Circuit reversed the trial court's decision that § 5.619 was pre-empted by federal regulation covering the same subject matter and

remanded the issue for further proceedings. More specifically, the Fifth Circuit's December 10, 1987 decision (MOPAC I) held regarding 16 T.A.C. § 5.619 that the competing affidavits filed with the opposing motions in the trial court created a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations, precluding resolution of the pre-emption question by summary judgment (833 F.2d at 575, App. E at 47a).

The case was reopened at the trial court level and proceeded to full trial on the merits. On September 6, 1990, judgment was rendered finding that 16 T.A.C. § 5.619 is pre-empted by federal regulatory occupation of the subject matter and alternatively finding that the state rule is pre-empted for failing the three part test contained in 45 U.S.C. § 434, the pre-emption provision of the Federal Railroad Safety Act, 45 U.S.C. §§ 421-444. A copy of the district court's decision is Appendix C to petitioners' petition for writ of certiorari.

The September 6, 1990 judgment of the United States District Court, Western District of Texas, Austin Division, rendered after full trial on the merits, was appealed by the Railroad Commission of Texas. The Fifth Circuit rendered its second decision (MOPAC II) in this litigation on December 6, 1991; it is this appellate decision of which petitioners seek review. The singular ruling of the Fifth Circuit in MOPAC II is that 16 T.A.C. § 5.619 is pre-empted by federal regulatory coverage of its subject matter; more specifically, the Fifth Circuit held that the subject matter of this state walkway rule is covered by Federal Railroad Administration regulations governing roadbed and track structures.

SUMMARY OF ARGUMENT

The Fifth Circuit in MOPAC II (Appendix A to petitioners' petition for writ of certiorari) utilized a different analysis of 45

U.S.C. § 434 than did the Ninth Circuit in its *per curiam* affirmation (*Southern Pacific Transportation Co. v. Public Utilities Comm'n of the State of California*, 820 F.2d 1111 (9th Cir. 1987)) of a lower court's 1986 ruling on cross motions for summary judgment (*see* App. F, G to petitioners' petition for writ of certiorari). However, the California federal district court's ruling is erroneous on its face. A proper disposition of petitioners' petition for writ of certiorari would be to grant the petition with a summary disposition by affirmation of the Fifth Circuit decision. The Fifth Circuit's pre-emption analysis appropriately balances the Federal Railroad Safety Act's goal of nationally uniform railroad safety rules and state sovereignty while preserving a federal regulatory scheme. The Ninth Circuit's curt adoption of its lower court's ruling, a ruling directly contrary to United States Supreme Court precedent and over twenty years of federal court pre-emption decisions, was ill-advised. Alternatively, the petition for writ of certiorari should be denied, in recognition of the facts that the Ninth Circuit's *per curiam* decision contains no substantive, and hence precedential, analysis of the pre-emption issue and that the Fifth Circuit's analysis is both detailed and correct. The Railroad Commission of Texas' 16 T.A.C. § 5.619 is pre-empted by federal regulatory occupation of its subject matter.

ARGUMENT

I.

Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. § 434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, in finding that 16 T.A.C. § 5.619 is pre-empted?

Petitioners assert that the Fifth Circuit decision errs in its application of Federal Railroad Safety Act pre-emption by improperly emphasizing national uniformity of regulations, and

champion a Ninth Circuit approach which utilizes a litmus test of comparison of purported objectives. Not only did the Fifth Circuit carefully balance the state and federal roles and properly consider both in its decision, but the Ninth Circuit approach, by clear federal precedent, is erroneous.

The Supremacy Clause, U.S. Const., art. VI, Cl. 2, nullifies state laws that interfere with or are contrary to federal law. Congress is authorized to absolutely pre-empt state rulemaking authority in a particular area. *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Even where Congress has not entirely displaced state rulemaking in a specific area, those lower laws are pre-empted to the extent that they conflict with federal law by standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Congressional intent to pre-empt state law in a given area may be inferred from the existence of a comprehensive scheme of federal regulation and when the area of law is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

In the area of rail safety matters, Congress has *expressly* declared its intent regarding pre-emption of state and local rules. 45 U.S.C. § 434 specifically provides that when federal law and regulation occupy a rail safety matter, no state law or regulation is permissible. When federal law and regulation address a rail safety matter but fail to wholly occupy the area, state regulation is only permitted if it satisfies three specific criteria. The pre-emption provision reads:

> The Congress declares that laws, rules, regulations,

> orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Congressional intent to pre-empt most state regulation except under narrow circumstances is made clear in the congressional deliberations prior to enactment of the Federal Railroad Safety Act. The House Report accompanying the draft bill clearly articulates the intent to establish uniform national standards:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system . . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company

> normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

1970 U.S. Cong. and Ad. News, 91st Cong. 2nd Sess. 4104, 4110-11.

In the House of Representatives discussion before the House vote on the Federal Railroad Safety Act, Rep. Jake Pickle explained Congress' intent to narrowly limit state action:

> Perhaps the most beneficial aspect of this legislation is that, unlike the Senate version, this bill precludes the possibility of 50 different sets of safety regulations from 50 different States. We take away the potential for patchwork and jig-saw puzzles in the area of railroad safety.

116 Cong. Rec. 27613 (August 6, 1970).

The text of the bill itself, together with these legislative history excerpts, evince a congressional intent that the Federal Railroad Safety Act and regulations promulgated thereunder are intended to supersede the exercise of state authority except in narrow circumstances. When Congress has manifested its intent clearly, there is no presumption against pre-emption of state safety regulations. *See, e.g., National Association of Regulatory Utility Comm'rs v. Colemen,* 542 F.2d 13 (3d Cir. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667 (9th Cir. 1972), *aff'd,* 411 U.S. 624 (1973).

After enactment of the bill the Federal Railroad Administration, the duly authorized representative of the Secretary

of Transportation, adopted sweeping regulations that include specifications for the roadbed, track geometry and track structure. 49 C.F.R. Part 213 (1985). These federal regulations comprehensively address rail safety standards, including specifications for the roadbed, track geometry and track structure. The scope provision of subpart B of 49 C.F.R. Part 213, that subpart specifically addressing the roadbed, describes its domain as the "roadbed and areas immediately adjacent to the roadbed."

When courts have been faced with the task of discerning the congressional intent of 45 U.S.C. § 434 *vis-a-vis* pre-emption, most have read it to provide a narrow exception to federal pre-emption of state regulation. In *Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Comm'n,* 453 F. Supp. 920 (N.D. Ill. 1977), the court considered a state order which required special handling of 130 commodities in addition to those commodities federal regulations already required to be specially handled. In addressing the pre-emption standard of 45 U.S.C. § 434, the court held that the standard ought to be read to broadly pre-empt state regulation:

> Although the court has found no reported decision which addresses the precise problems raised by this case, those which have dealt with the Railroad Safety Act are uniform in their finding of Congressional intent to pre-empt most state regulation relating to railroad safety. Commenting on § 434, which is quoted above, the Third Circuit said, "We believe these statutory provisions evince, as the district court determined, 'a total pre-emptive intent.' " Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety . . ."

ATS&F v. ICC at 925 (quoting *National Association of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) and *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973)).

The Fifth Circuit, in a case in which this Court denied a petition for certiorari, had already assessed congressional intent regarding pre-emption of state regulations of rail safety matters. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973), the Fifth Circuit considered a Louisiana parish's attempt to regulate allegedly dangerous conditions of railroad tracks, roadbeds and other facilities. The Fifth Circuit held:

> The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety, but the statute is not ironclad. The Act specifically authorizes a narrow spectrum of deviation from national uniformity, and the issue here is whether appellants' state court suit falls within one of the permissible exceptions.

Id. at 1112.

Indeed, a recent Fifth Circuit case between these same parties involved the railroads' challenge to a different state regulation (a caboose rule). The appellate court was charged with determining the pre-emptive effect of the Federal Railroad Safety Act on that state rule. While the Fifth Circuit with the caboose rule found implied pre-emption, an issue not raised herein, the appellate court did note the *de minimus* role of state regulations:

> We read the statement as indicative of congressional intent that states play an important

> stopgap role in the safe transition from state to federal regulation of railroads. The FRSA has been in effect eighteen years. If there remain non-local matters of railroad safety open for state regulation, they do not include areas in which the FRA has chosen not to act.

Missouri Pacific Railroad, et al. v. Railroad Comm'n of Texas, et al., 850 F.2d 264, 268 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

For the purposes of general pre-emption analysis, it is clear that the Fifth Circuit had already ruled that only a narrow exception exists to federal pre-emption in rail safety matters. In short, 45 U.S.C. § 434 generally only allows a narrow exception to federal control of railroad safety matters, pre-empting most state regulation.

Against this backdrop of the Federal Railroad Safety Act's legislative history and judicial treatment, the Fifth Circuit considered the state rule which requires construction of walkways on the track roadbed, that zone of soil or rock which supports loads from the track structure and for which zone the Federal Railroad Administration has prescribed minimum specifications. The Fifth Circuit drew from its earlier walkway decision, MOPAC I (Appendix E to petitioners' petition for writ of certiorari), to discern the meaning of the phase "covering the subject matter" in the statute; the court concluded that a pragmatic approach to reconciliation of the federal regulations concerning roadbed and track structure (49 C.F.R. Part 213) and the state rule is appropriate. Specifically, the Fifth Circuit stated in its first decision and referenced in its second:

> This would be the case if, from a practical standpoint, the width, surface and slope

> requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements. If the walkway regulation has this effect, we hold that the federal regulation has "covered the subject matter" of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards "to the extent practicable."

833 F.2d at 575, Appendix E at 47a.

If the implementation of the state walkway rule would "add to" the Federal Railroad Administration's track structure regulations, the Fifth Circuit stated that 16 T.A.C. § 5.619 would be pre-empted.[1] The task of the trial court on remand was to review all factual evidencce concerning the practical effects of the state walkway regulation on the Federal Railroad Administration standards to see if the former did "add to" Federal Railroad Administration standards. The trial court found that the state rule did add to federal standards and was hence pre-empted, and the Fifth Circuit affirmed this in MOPAC II.[2]

---

1. This type of pragmatic approach to the pre-emption question of whether a state rule stands as an obstacle to a federal proscription is precisely what this Court has deemed appropriate. Justice Marshall wrote: "Our task is 'to determine whether, under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations omitted.] This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1976).

2. Incidentally, the trial court's conclusion that the state walkway rule is pre-empted was supported by the Federal Railroad Administration. By letter

(Cont'd)

While applying its pragmatic approach to the pre-emption analysis, the Fifth Circuit was careful to recognize and consider the state's role in railroad safety regulation. The appellate court recognized that some state regulations of walkways might be consistent with Federal Railroad Administration track structure and construction requirements, and indeed provided petitioners an example of just such a permitted state walkway regulation. (833 F.2d at 575, App. E at 47a, nt. 12). In short, the Fifth Circuit recognized the state's permitted role in railroad safety matters and carefully balanced that role with the pervasive federal regulatory scheme embracing roadbed and track structures.

In contrast to the Fifth Circuit's reasoned approach, the petitioners promote the Ninth Circuit's *per curiam* litmus test of comparing the stated objectives of potentially conflicting federal and state regulations. Petitioners assert that whether federal and state regulations "cover the same subject matter" depends upon whether they have the same purpose, and rely upon the California federal lower court's unadorned conclusion that: "State and federal regulations therefore cannot be held to cover the same subject matter unless they address the same safety concerns." (647 F. Supp. at 1225, App. F at 63a).

(Cont'd)
from Chief Counsel John M. Mason of the U.S. Department of Transportation, Federal Railroad Administration, addressed to the individual Railroad Commission members and provided to the trial court, the Federal Railroad Administration stated after a detailed discussion:

> In conclusion, it is my opinion as Chief Counsel that § 5.619 has been pre-empted, since the subject matter has been addressed by the Federal Railroad Administration and the broad nature of the order does not comport with the Safety Act criteria for additional State requirements.

Such an interpretation is far from the congressional intent to create a narrow exception to federal pre-emption of most state rail safety regulation. Such an interpretation would allow any state rail safety rule to stand regardless of how it impaired the federal regulatory scheme, so long as a state official could incant a different safety purpose. The Fifth Circuit in MOPAC I considered and rejected such an interpretation.

> If the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area. Federal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations "cover the subject matter."

(833 F.2d at 574, App. E at 45a).

Case law confirms that the underlying purpose of a state rule is not controlling in a pre-emption analysis. This Court has stated:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

Similarly in *Perez v. Campbell,* 402 U.S. 637 (1971), this Court stated:

> We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law.

Id. at 651-52.

In *Northern Border Pipeline Co. v. Jackson City,* 512 F. Supp. 1261 (D. Minn. 1981), the court ruled that the Federal Natural Gas Pipeline Safety Act pre-empted a local ordinance requiring pipelines to be buried deeper than required by federal law. The federal statute was aimed at insuring safe interstate transmission of gas, whereas the local ordinance was aimed at protecting the environment.

> The Gas Safety Act and its legislative history indicate that Congress has unmistakably ordained that the federal law pre-empts state law. The case law is in agreement . . . The fact that the ordinance here is cast in terms of natural resources protection is not determinative. Whether or not federal legislation pre-empts state and local regulation rests on the effect rather than the state purposes of the legislation.

Id. at 1265.

Differing objectives of federal and state proscription are not determinative in a pre-emption analysis.[3] Petitioners' assertion that the Ninth Circuit's *per curiam* adoption of such an approach is proper belies federal precedent and reason.

Petitioners make mention of the *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991) decision as in some fashion affecting the different analyses of 45 U.S.C. § 434 by the Fifth and Ninth Circuits. A simple review of the *Norfolk* case reveals that the pre-emption issue involved was one of implied pre-emption per *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). The issue was whether a state may require walkways on railroad bridges in view of the Federal Railroad Administration's 1977 explicit refusal to adopt a bridge walkway regulation. As made clear early in the first Fifth Circuit decision in this case (833 F.2d at 575-576, App. E at 48a-49a), the Fifth Circuit dismissed discussion of implied pre-emption with the instant (non-bridge) walkway rule. No issue of implied pre-emption was involved in MOPAC II, the case of which petitioners seek review. The *Norfolk* case is irrelevant to this Court's deliberations.

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3. Both *Florida Lime* and *Perez* have been frequently cited for this proposition. As a recent example, Justice White while dissenting on other matters wrote concerning pre-emption:

> Initially, the proper focus under the Supremacy Clause is not the avowed purpose for which the State adopts a given provision but the actual effect of the provision on the operation of a federal instrumentality and on its ability to achieve the objectives of federal law and policy for which it has been created.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 188 (1988).

CONCLUSION

While there are two different approaches to pre-emption analysis of state walkway rules, the Ninth Circuit's is clearly wrong. The petition for writ of certiorari is appropriate for summary disposition[4]; no amount of briefing or argument by petitioners can overcome federal precedent holding that the purported objective of a state rule is not controlling in a pre-emption analysis. Alternatively, since the Ninth Circuit's decision is merely a cursory *per curiam* approval without analysis or discussion, as contrasted with the detailed reasoning of the Fifth Circuit, the petition for writ of certiorari ought be denied. The Fifth Circuit recognized the state's role in railroad safety regulation, and reasonably balanced the state walkway rule against its effect on the federal regulatory structure.

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4. Justice Marshall in dissent discussed the role of summary disposition/reversal in *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." A summary affirmation appears even more rare, but here the law is settled that (1) pre-emption analysis is not determined by differing objectives of regulations, (2) there is no dispute that differing objectives was the Ninth Circuit's only criterion for its decision and (3) the Fifth Circuit's pre-emption analysis is reasoned and correct.

Respectfully submitted,

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No. 91-1423

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners

v.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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Date: July 30, 1992

QUESTION PRESENTED

1. Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. §434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. §421 et seq., in finding that 16 T.A.C. §5.619 is pre-empted?

LIST OF PARTIES

Petitioners:

Railroad Commission of Texas

Its Members: James E. Nugent
Robert Krueger
Lena Guerrero

Respondents:

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

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No. 91-1423

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

On December 6, 1985, the Railroad Commission of Texas published a set of proposed rules, identified as 16 T.A.C. §§5.616-5.621. No administrative hearing was held, but public comments were solicited and received, including submission of voluminous material and briefing by the respondents. On June 3, 1986, the rules with some modifications were adopted by the Railroad Commission of Texas. Among the rules adopted was 16 T.A.C. §5.619, the only rule still involved in this litigation. Sixteen T.A.C. §5.619 requires construction of walkways on the track roadbed, that zone of soil or rock which supports loads from the track structure and for which zone the Federal Railroad Administration has prescribed minimum specifications.

The railroads/respondents challenged the state rules in the United States District Court, Western District of Texas, Austin Division, and that challenge has traveled from that District Court to the Fifth Circuit Appellate Court, returned to the District Court and then revisited the

Fifth Circuit. The full prior history of the case was presented in Respondents' Brief in Opposition, filed herein on April 2, 1992. The Fifth Circuit rendered its second decision (Missouri Pacific Railroad Co. v. Railroad Comm. of Texas, 948 F.2d 179 (5th Cir. 1991), (hereinafter MOPAC II), on December 6, 1991; it is this appellate decision of which petitioners seek review. The singular ruling of the Fifth Circuit was that 16 T.A.C. §5.619 is pre-empted by federal regulatory coverage of its subject matter. More specifically, the Fifth Circuit held that the state walkway rule is covered by Federal Railroad Administration regulations governing roadbed and track structures.

ARGUMENT

Pursuant to Supreme Court Rule 15.7, respondents submit this supplemental brief to address matters new since we filed our opposition and to advise the Court that, in response to those new developments, respondents now agree with petitioners that certiorari should be granted.

The petition presents questions about the proper interpretation of the express pre-emption provision of §434 of the Federal Railroad Safety Act of 1970, 45 U.S.C. §434, as applied to state regulations requiring walkways on the track structure. Section 434 provides that a state "law, rule, regulation, order or standard relating to railroad safety" is pre-empted once "the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement."

In their opposition filed on April 2, 1992, respondents took the position that the decision of the Fifth Circuit below, although in conflict with a per curiam decision of the Ninth Circuit, was so clearly correct that this Court should either grant certiorari and summarily affirm or deny certiorari (Opp. pp. 4, 16). Respondents did not take issue with the implicit premise of the State's petition that the recurring question of how to construe §434 is an important one warranting this Court's attention.

On April 27, 1992, this Court invited the Solicitor General to present the views of the United States as to a petition (No. 790) and cross-petition (No. 91-1206) seeking review of an Eleventh Circuit's decision in another case concerning §434. Easterwood v. CSX Transp., Inc., 933 F.2d 1548

(11th Cir. 1991). There the court of appeals held that §434 pre-empts state tort law as applied to train speed but not as applied to grade crossing design. On June 8, 1992, the Solicitor General submitted a memorandum urging the Court to grant both petitions in view of the importance of these recurring issues under §434 and the conflict among the lower courts concerning the grade crossing issue. Noting that the issues involve "considerable difficulty and complexity" (U.S. Br. 15), the Solicitor General did not take a position on the merits of the questions presented by the petitions in Easterwood. On June 29, 1992, the Court granted both petitions.

In addition, since the filing of respondents' opposition the Court has also decided three cases involving the interpretation of express pre-emption provisions: Morales v. Trans World Airlines, Inc., 60 U.S.L.W. 444 (June 1, 1992), Gade v. National Solid Wastes Mgt. Ass'n., 60 U.S.L.W. 4587 (June 18, 1992), and Cippolone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (June 24, 1992). In these cases, various sharply divided majorities or pluralities have resolved pre-emption issues in ways that may have a bearing on the issues raised by the Easterwood petitions or by the petition in this case.

Respondents now believe, in view of these developments, that the Court should grant the State's petition. This case provides a useful vehicle for the Court to address the important type of pre-emption question also raised in Easterwood, but in a context in which those issues were central and which may provide a more developed context for the Court's decision, and which involves an additional aspect of the issues concerning §434.

A threshold question in Easterwood, particularly as to the grade crossing issue, is whether §434's pre-emption is triggered only by regulations issued by the Secretary under the Rail Safety Act (as the Eleventh Circuit held), or also by regulations issued by the Secretary under other laws, such as the federal highway laws (as the Secretary and the Solicitor General contend). There is no such threshold question in this case.

As to both issues in Easterwood, moreover, there is a question,noted by the Solicitor General (U.S. Br. pp. 18-19), of determining what "requirement" of state law is at issue and whether it is among the categories of state-created legal obligations pre-empted by §434. There are no such concerns in this case.

The Eleventh Circuit's decision concerning the speed limit considered and rejected a contention that §434 applies only when state and federal requirements concerning the same subject matter have the same objectives, motives or purposes. The court's rejection of that contention (933 F.2d at 1553-54) is consistent with the decision below in this case (where the State made the same contention) but is at odds with the Ninth Circuit's decision in another recent case involving state walkway requirements, Southern Pacific Transp. Co. v. Public Util. Comm'n, 820 F.2d 111 (9th Cir. 1987) (the case cited as conflicting with MOPAC II by the State in the instant case).

This case presents an additional and fundamental question not decided in Easterwood as to either the grade crossing or speed limit issue, i.e., what constitutes the same "subject matter" under §434. It is not at all clear that the Court's resolution of Easterwood will provide guidance on this basic question under §434.

Finally, the Fifth Circuit's decision in this case was based on an extensive factual record concerning the conflict and impact of the state walkway regulation requirements on the federal requirements concerning track roadbed. This factual record may also be important to an analysis of the "subject matter" under §434. We understand that there is not a comparable record as to the issues presented in Easterwood.

For these reasons, respondents submit that the Court should grant the State's petition so that it can consider the pre-emption issues in a more developed context where the fundamental question is inescapably presented. We note that, since the Court has not yet scheduled oral argument in Easterwood, there should be no problem in considering the cases in tandem, if the Court wishes to do so.

In the alternative, if the Court does not grant certiorari now, it should hold the case pending disposition of Easterwood and then grant certiorari if that case is decided on grounds other than the questions of the proper construction of §434.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing instrument was served upon Mr. Douglas Fraser, Assistant Attorney General, Energy Division, 1124 S. IH-35, 2nd Floor, Austin, Texas 78704, by Hand Delivery in accordance with Fed. R. App. P. 5 on this 30th day of July, 1992.

Robert B. Burns, Jr.

Supreme Court, U.S.
FILED
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No. 91-1423

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAILROAD COMMISSION OF TEXAS, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Texas Administrative Code tit. 16, § 5.619 (1988), which requires railroads to provide walkways adjacent to railroad tracks in certain circumstances, is preempted by regulations adopted by the Secretary of Transportation, pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. 434.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents, a group of railroad companies, brought this action against petitioners Railroad Commission of Texas and its Commissioners seeking declaratory and injunctive relief that certain safety regulations promulgated by the Commission are preempted by federal law.

1. The state regulation at issue in this case requires railroads to construct walkways alongside railroad tracks, in certain circumstances and in conformity with design specifications set by the Commission.[1] See Tex. Admin.

[1] The term "walkway" is defined by the Commission as "[a] pathway located alongside a railroad track or railroad switch for the purpose of providing an area for a railroad employee to perform

Code tit. 16, § 5.619 (1988). Walkways are required in the following circumstances:

> Walkways shall be located along both sides of all tracks within yards and tracks adjacent thereto so as to include all points contiguous to yards where railroad employees normally work on the ground. Walkways conforming to this standard shall be constructed and maintained throughout the area where mechanical inspections routinely occur.

Id. § 5.619(e). The regulations detail the locations where walkways are required (*id.* § 5.619(f)-(h)), and also prescribe the surface, slope, and width of the walkways (*id.* § 5.619(b)-(d)). The purpose of the regulations is to enhance occupational safety by providing more secure footing for railroad employees working alongside the tracks. Pet. 4. The question presented is whether these walkway regulations are preempted by federal law.

2. a. In 1970, Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421, 431 *et seq.*, to "promote safety in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C. 421. To that end, FRSA gives the Secretary of Transportation authority to promulgate regulations relating to railroad safety. The Secretary has in turn delegated that authority to the Administrator of the Federal Railroad Administration (FRA). 49 C.F.R. 1.49(m).

FRSA also provides that regulations issued by the Secretary preempt any state requirement if the "subject matter" has been "cover[ed]" by the Secretary, unless the state requirement represents a supplemental (but not conflicting) response to an "essentially local safety hazard." 45 U.S.C. 434. This express preemption provision states in its entirety:

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duties associated with that track." Tex. Admin. Code tit. 16, § 5.619(a)(1) (1988).

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. 434.

b. Over the last two decades, the Secretary has exercised his delegated rulemaking authority to issue extensive safety regulations relating to railroad operations. The overall safety program adopted by FRA is set forth in Parts 200-240 of Title 49 of the Code of Federal Regulations.

Subpart B of Part 213 directly establishes the minimum safety requirements a railroad must satisfy "for roadbed and areas immediately adjacent to roadbed." 49 C.F.R. 213.31.[2] The regulations impose two principal requirements. First, a railroad must ensure that drainage facilities "under or immediately adjacent" to the roadbed be maintained so as "to accommodate expected water flow for the area concerned." 49 C.F.R. 213.33. Second, vegetation "on or immediately adjacent to roadbed must be controlled" to ensure that it does not, *inter alia*, "[i]nterfere with railroad employees performing normal trackside duties." 49 C.F.R. 213.37, 213.37(c).

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[2] The federal regulations therefore operate in the same area described in the Texas walkway regulations, *i.e.*, the area "along both sides of all tracks." Tex. Admin. Code tit. 16, § 5.619(e) (1988).

Subpart D, which governs the requirements for "track structure," also has a bearing on the structural characteristics of the roadbed. Those regulations require that track must be supported with ballast materials that:

> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track cross-level, surface, and alinement.

49 C.F.R. 213.103.

FRA has not adopted regulations requiring railroads to construct walkways adjacent to railroad tracks. The only express reference to walkways in FRA regulations is set forth in standards governing railroad bridges and trestles. Under 49 C.F.R. 214.103(c), FRA has specified certain design requirements governing walkways on bridges and trestles, if the railroads or their contractors decide to utilize walkways in lieu of personal fall arrest systems or safety nets. See "Final Rule: Bridge Worker Safety Rules," 57 Fed. Reg. 28,116, 28,128 (June 24, 1992) (to be codified 49 C.F.R. 214.103(c)).

3. a. In October 1986, the Chief Counsel of FRA advised the Commission by letter of FRA's view that Section 5.619 is "without force and effect," because it is preempted by federal law. See Letter from John M. Mason, FRA Chief Counsel, to the Texas Railroad Commission 1 (Oct. 17, 1986) (Mason Letter) (*reprinted*, App., *infra*, 1a-8a). In support of that conclusion, the letter cited the track safety and roadbed composition regulations, which he noted extended to areas immediately adjacent to the roadbed. Invoking FRSA's express preemption provision, 45 U.S.C. 434, the Chief Counsel stated (Mason Letter at 4; App., *infra*, 6a):

> although FRA has not issued a specific rule on walkway location and width, in my opinion FRA has acted so as to occupy the subject matter addressed by the Commission's rule, *i.e.*, trackside walkways, a matter subsumed by the larger subject of areas immediately adjacent to the roadbed.

b. FRA has addressed the subject of walkways and worker safety in other contexts as well. Although FRA's safety program does address concerns related to worker safety, in 1975 FRA considered adoption of a code of occupational standards directed at all railway employee activities. 40 Fed. Reg. 10,693 (1975). FRA later concluded that this rulemaking should be terminated. That decision was reflected in a 1978 Policy Statement in which FRA concluded that a comprehensive code of occupational regulations was unnecessary in light of regulations promulgated by the Occupational Safety and Health Administration (OSHA), covering a broad range of employee activity. At the same time, however, the agency expressed its determination that OSHA regulations concerning walking and working surfaces should not apply to "walkways beside the tracks in yards or along the right-of-way." 43 Fed. Reg. 10,587 (1978).

With respect to the specific question of walkways, the agency in 1977 considered, but declined to adopt, a proposed rule requiring railroads to construct walkways on bridges and trestles. FRA found that the benefits of the walkways rule would be outweighed by the costs. 42 Fed. Reg. 22,184, 22,185 (1977). The agency further concluded that States should instead address the "employee safety problem" by requiring walkways "in a particular area" or "on a particular structure" as "local" conditions require. *Id.* at 22,185.

4. Respondents brought the present action in federal district court seeking to enjoin the Commission's enforcement of Section 5.619. The complaint alleged that the regulation was preempted by FRSA and the agency's

implementing regulations.[3] Respondents ultimately prevailed on that preemption claim after two appeals.

a. The district court initially granted summary judgment for the railroads in 1987 based upon its conclusion that walkways were part of the roadbed, and the subject of roadbeds had been occupied by FRA regulations. See *Missouri Pacific R.R.* v. *Railroad Comm'n*, 653 F. Supp. 617, 624-626 (W.D. Tex. 1987). On appeal, the Fifth Circuit reversed and remanded for further proceedings. See *Missouri Pacific R.R.* v. *Railroad Comm'n*, 833 F.2d 570 (5th Cir. 1987) (*reprinted*, Pet. App. 40a-55a).

The court of appeals rejected the argument that FRA's failure to adopt a walkway requirement should itself be dispositive of the preemption inquiry. Pet. App. 48a-49a. The court determined that this regulatory omission should not be construed as an FRA policy decision that walkways should not be required. Instead, the court viewed FRA's actions in prior rulemaking proceedings concerning various walkway and worker safety issues as a decision to postpone consideration of the issue. *Id.* at 49a.

The court nevertheless concluded that preemption should be required if Section 5.619 had the practical effect of regulating the design and structure of the roadbed and track. Pet. App. 46a-47a. In the court of appeals' view, "if, from a practical standpoint, the * * * requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements," *id.* at 47a, the federal regulations have covered the subject matter of the state rule and preemption is triggered. Because the Commission had submitted an affidavit disputing the railroads' claim that walkways

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[3] The complaint also challenged other regulations, and included other causes of action. The challenged regulations were upheld in part and invalidated in part. See Pet. App. 40a-55a. The only issue before this Court is whether Section 5.619 is preempted by FRSA.

would materially impact the roadbed structure, the court of appeals remanded the case for trial. *Id.* at 47a-48a.

b. After trial on remand, the district court concluded that Section 5.619 is preempted by FRSA. See Pet. App. 18a-37a. Both parties presented expert testimony concerning the factual relationship between compliance with the state and federal regulations. Based upon the testimony of the railroads' experts, which the district court found to be "more persuasive," *id.* at 31a, the court entered factual findings concerning the effects of compliance with the state requirement on the federal scheme.

First, the district court concluded that walkways are "an integral part" of the "roadbed and track structure." Pet. App. 33a. Second, the district court concluded that compliance with Section 5.619 would generally require railroads "to strengthen or enlarge the roadbed beyond the FRA requirements." Pet. App. 32a. Third, the court further found that compliance with Section 5.619 would directly interfere with the track safety standards adopted by FRA. The court based that conclusion on the fact that the state-mandated walkways would have to be constructed with "materials that would, because of continuous rail traffic and regular maintenance, have the effect of weakening the track structure, impair drainage, and in time, weaken the roadbed itself." Pet. App. 33a.[4]

The court of appeals affirmed, concluding that the district court's factual findings regarding the practical

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[4] In an alternative holding, the district court (Pet. App. 34a-36a) concluded that Section 5.619 does not come within FRSA's "local safety hazard" exception, see 45 U.S.C. 434. The court noted that rules applicable on a statewide basis cannot be addressed to local hazards, and, in any event, the state regulation is incompatible with federal rules because the walkways required by state law would "impede the drainage capability of the track structure." Pet. App. 36a. The court of appeals found it unnecessary to reach the local safety hazard issue because the Commission expressly disclaimed reliance on that exception to FRSA preemption. *Id.* at 13a.

effects of Section 5.619 on the operation of FRA regulations were not clearly erroneous. Pet. App. 1a-15a. Accordingly, the court permanently enjoined enforcement of Section 5.619.

DISCUSSION

In our view, the court of appeals correctly determined that petitioner's rule mandating walkways alongside railroad tracks is preempted. Further, we do not believe that it is necessary for the Court to grant plenary review of the issue at this time. Although the decision conflicts with a per curiam affirmance of the Ninth Circuit in *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 820 F.2d 1111 (1987), that conflict may well be resolved by the circuits upon reconsideration of this issue in light of the decision in *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206 (argument scheduled for Jan. 12, 1993). The threshold issue here, as in *CSX*, is the proper standard for determining when a federal regulation should be found to "cover[] the subject matter" of a state requirement within the meaning of Section 434 of FRSA. We therefore believe that the petition in this case should be held pending the decision in *CSX*, and that the need to remand the case for further proceedings should be determined in light of that decision.

1. Under well-established principles governing preemption analysis, state law is preempted in any circumstance in which Congress expressly so provides. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Section 434 of FRSA, 45 U.S.C. 434, is such an express preemption provision. In order to ensure "to the extent practicable" national uniformity of rail safety regulation, Section 434 mandates that state laws relating to railroad safety—such as the regulation at issue in this case—are preempted if the Secretary of Transportation promulgates a rule, regulation, standard or order "covering the subject matter" of the state requirement. 45

U.S.C. 434. To the extent that the Secretary has covered a subject (and where Section 434's local hazard exception is not applicable) a State is expressly precluded from continuing to enforce its own requirements.[5] Rather, the Secretary's regulation is substituted as the governing rule.

In *CSX*, the United States filed a brief as amicus curiae setting forth our view of the proper analysis of pre-emption issues under FRSA. In our view, whether the Secretary has "cover[ed]" a subject matter should be determined by reference to several factors. First, "if the specific requirement imposed on the railroad by the State has also been addressed by the Secretary" directly through regulations, then the subject of the state requirement has been "covered." Brief for the United States as Amicus Curiae Supporting Affirmance at 15-16, *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206. Second, "if the Secretary has not addressed the specific state requirement, preemption should nevertheless be found if federal regulations deal broadly and substantially with—in effect, occupy the field of—the state law requirement at issue." *Id.* at 16. Third, the agency's interpretation of the "subject" covered by its safety regulation—and therefore its preemptive scope—should ordinarily be dispositive. *Ibid.*

2. Although federal regulations do not expressly address the need for walkways alongside railroad tracks to promote worker safety, the second and third factors set forth in our brief in *CSX*—the scope of the field regulated by FRA and the agency's intent—fully support the

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[5] Under the local hazard exception, States are permitted to continue to enforce a regulation "when necessary to eliminate or reduce an essentially local safety hazard," so long as the provision does not conflict with federal regulations and does not impose an undue burden on interstate commerce. 45 U.S.C. 434. We agree with the district court that Section 5.619 does not come within that exception because it is applicable throughout the State of Texas. Petitioners do not contend otherwise. See Pet. App. 13a.

court of appeals' conclusion that Section 5.619 is preempted. Regardless of the subject matter label the Commission may seek to attach to its regulation, it is apparent that Texas has sought to enhance railway employee safety by regulating the design of the roadbed adjacent to the track. That subject has been covered by FRA's regulations.

a. FRSA granted the Secretary broad authority to regulate "all areas of railroad safety." 45 U.S.C. 431(a). As the agency has developed its overall safety program, it has unquestionably taken into account the safety of railway employees. See, *e.g.*, 40 Fed. Reg. 20,693 (1975). One component of that overall safety program is the regulation of the roadbed and the adjoining area alongside the track. FRA has established the "minimum requirements" the railroad must meet to construct a safe "roadbed and areas immediately adjacent to roadbed." 49 C.F.R. 213.31. Those minimum safety standards do not mandate construction of walkways on top of or adjoining the roadbed. Section 5.619 seeks directly to supplement FRA's minimum safety requirements by mandating the construction of roadbeds equipped with walkways. Because FRA has already regulated comprehensively on the subject of the design standards for the construction of areas adjacent to the track, the state regulation is necessarily preempted.[6] See *Gade* v. *National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2385 (1992) ("To allow a State selectively to 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with [a]

[6] This conclusion holds true regardless of whether the agency actually considered the specific hazard the State sought to regulate, here the footing of railway employees working alongside the track. That is the very nature of field preemption. See, *e.g.*, *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 612-613 (1926). The agency's regulation of the subject must, however, be comprehensive enough to support the conclusion that the subject has been "covered", and that supplemental state regulation is thereby prohibited.

federal scheme of establishing uniform federal standards."); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (where "federal scheme * * * aims precisely at the same ends as does [the state scheme]," state scheme cannot be defended on grounds that it establishes "different and higher design requirements").

Any claim that "walkways" and "roadbeds" are separate and independent "subjects" is directly refuted by the factual findings entered in this case. The district court found, and the court of appeals agreed, that compliance with Section 5.619 would require railroads to change the materials that make up roadbeds and to enlarge and strengthen existing roadbeds. See Pet. App. 8a-9a. The State has accordingly sought to regulate the problem of insecure footing alongside the track by regulating the construction of the roadbed—the very subject of FRA regulations. That it cannot do. See *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 612 (1926) (holding that a state law mandating an automatic firedoor on locomotives to protect firefighters was preempted by federal laws regulating locomotive design, even though the federal agency had not addressed this specific hazard, because the laws would "operate upon the same object" and were "directed to the same subject—the equipment of locomotives"). See also *Gade*, 112 S. Ct. at 2385 (efforts to regulate public safety through imposition of safety standards on workers impermissibly intruded into subjects regulated by OSHA). The problem posed by uncoordinated safety regulation by state and federal authorities in this area is underscored by the district court's further finding that construction of the walkways in the manner required by Texas law would in fact "weaken[]" the "track structure" and the "roadbed." Pet. App. 33a.

b. The agency has consistently interpreted its regulations as fully occupying the subject of roadbed structure, to the exclusion of the State's authority to adopt state-

wide walkway requirements. Under Section 434, Congress gave the Secretary authority to preempt all statewide regulation of railroad safety issues through adoption of standards and orders so that uniform, national regulation could be achieved "to the extent practicable." For this reason, it is both reasonable and logical to define the scope of the "subject" addressed by federal regulations through reference to the agency's intent.

i. FRA has repeatedly expressed the view that the issue of trackside walkways is encompassed by its regulations governing the subject of track and roadbed design, and that States have no authority to mandate construction of walkways in the absence of a local hazard. As set forth, FRA specifically advised the Commission in 1986 of the agency's view that Section 5.619 was "without force and effect" because trackside walkways are encompassed within the "subject of areas immediately adjacent to the roadbed." Mason Letter at 1, 4; App., *infra*, 1a, 6a. FRA has also advised other States that federal law prohibited imposition of statewide walkway requirements.[7]

ii. The agency's interpretation of the scope of the subject matter covered by its regulations is also grounded in the FRA Policy Statement issued in 1978. 43 Fed. Reg. 10,583 (1978). That policy was adopted in connection with the agency's decision not to issue a comprehensive code of occupational standards covering all aspects of railway employment. The Policy Statement explains that FRA has had "longstanding" involvement in "regulatory activities concerned with assuring * * * safe working conditions for railroad employees." *Id.* at 10,584. Although the agency determined that it should not venture into areas traditionally regulated by OSHA by adopting occupational standards governing issues common to railroad and non-railroad employees in "railroad yards, shops, and associated offices," *id.* at 10,587, it em-

[7] We have lodged copies of these letters with the Court.

phasized that it had in the past, and would in the future, reserve exclusive authority over occupational safety issues presented by core railroad operations on and alongside the tracks. *Id.* at 10,586, 10,587.

FRA explained that the "objective of protecting" all "railroad employees," as well as other persons "along the right-of-way" was "implicit" in its regulations, including those governing tracks and roadbeds. 43 Fed. Reg. 10,585 (1978). The Policy Statement underscored the agency's view that supplemental regulations by other governmental agencies in these areas would be counterproductive. It further explained that this view is based on the fact that "[p]rotection of the public generally and employees in particular is, of necessity, an integrated undertaking," because "it is not possible to regulate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* The agency specifically stated that it considered hazards addressed by walkways beside the tracks to be within the area as to which the agency had occupied the field. *Id.* at 10,587.[8]

iii. It is also germane that FRA has consistently rejected proposals to adopt supplemental regulations requiring walkways on railroad bridges. In 1977, the agency concluded that such a rule was not only unwarranted,

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[8] In its first decision in this case, the court of appeals construed this section of the Policy Statement as a concession that the agency had not yet addressed the issue of walkways. Pet. App. 49a. To the contrary, the Statement reflects the agency's position that it had already regulated comprehensively in this area, and that it would supplement its regulatory scheme if and when it determined that there was a need for additional standards. See 43 Fed. Reg. 10,586 (1978) (stating that the agency had already "exercised its statutory authority" concerning the field of "[t]rack, roadbed and associated devices and structures" and that "[w]hile it is expected that additional regulatory initiatives may be undertaken, as necessary, * * * it is the judgment of the agency that piecemeal regulation of individual hazards * * * by any other agency of government would be disruptive and contrary to the public interest").

but might have a deleterious effect on safety. See 42 Fed. Reg. 22,185 (1977).[9]

Responding to a congressional directive to consider safety issues pertaining to workers on railroad bridges, see Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 19, 102 Stat. 637 (codified as 45 U.S.C. 431(n)), FRA recently revisited the issue. Again, however, the agency concluded that a walkway requirement would be inappropriate. "Federal Railroad Administration, Notice of Proposed Rulemaking: Bridge Worker Safety Rules," 56 Fed. Reg. 3434 (1991). In concluding that walkways should not be required, FRA stated:

> [T]he high cost of complying with a federal walkway requirement could divert funds otherwise intended for ongoing maintenance and improvement programs. The net result could actually decrease overall safety to railroad employees and members of the public.
>
> Based on these findings, FRA determined [in 1977] that a federal walkway requirement was not warranted, and in fact, may be deleterious to railroad employee[s'] safety.

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[9] FRA noted that:

> [T]he issuance of a Federal rule requiring walkways on railroad bridges, trestles, and similar structures cannot be justified at the present time. First, any such rule would impose significant added burdens in terms of the large dollar cost to the railroad industry for construction of the walkways, the added hazard to persons and property and additional liability exposure for the railroads because of increased trespassing, and the possible decrease in overall railroad safety because of the diversion of resources from other maintenance and improvement projects. Secondly, neither the commenters nor the FRA has been able to demonstrate that such a rule would result in a definite or measurable improvement to railroad employee safety. Finally, if an employee safety problem does exist because of the lack of walkways in a particular area or on a particular structure, regulation by a State agency that is in a better position to assess the local need is the more appropriate response.

42 Fed. Reg. 22,185 (1977).

Id. at 3438. In the final rule, FRA concluded that railroads should have the option of using walkways in lieu of personal fall arrest systems or worker safety nets. See "Federal Railroad Administration, Final Rule: Bridge Worker Safety Rules," 57 Fed. Reg. 28,116 (1992) (promulgating rule, to be codified at 49 C.F.R. 214.103(c), prescribing standards for walkways in such circumstances).[10]

iv. In summary, FRA has consistently expressed the view that its regulations cover the subject addressed by state-imposed walkway requirements and that such state requirements are preempted by Section 434 of FRSA. Not only is that conclusion required by a proper analysis of the scope of preemption under FRSA, as a practical matter it does not create any regulatory lapse. Under 45 U.S.C. 432, the Secretary has authority to issue emergency orders to remedy unsafe conditions. As the district court noted, FRA has persuaded railroads in Texas to remedy unsafe walkway conditions in Texas, on at least

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[10] FRA has accordingly decided, based upon its expert weighing of relevant safety considerations, not to impose a walkway requirement—on railroad bridges or elsewhere. That decision would, in and of itself, provide an independent basis for preemption, even if the Court were to find that the roadbed regulations had not already covered this subject through occupation of the field. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such regulation.") (internal quotation mark omitted). See also, *Missouri Pacific R.R.* v. *Railroad Comm'n*, 850 F.2d 264 (5th Cir. 1988) (concluding that FRA's decision not to prescribe regulations concerning the use of cabooses (see 51 Fed. Reg. 17,300-17,301 (1986)) was preemptive under Section 434 of FRSA); *Norfolk & Western R.R.* v. *Public Utilities Comm'n*, 926 F.2d 567, 571-572 (6th Cir. 1991) (holding that FRA's decision not to promulgate regulations requiring walkways on railroad bridges was preemptive of state efforts to impose such rules because FRA's "deliberate refusal to require walkways * * * negatively preempted [the state rule] because the FRA ha[d] 'covered' the subject matter."). But see Pet. App. 48a-49a.

two occasions without having to issue emergency orders. See Pet. App. 33a. There is accordingly no reason to believe that the agency's interpretation of the subject matter covered by its regulations does not conform to congressional intent.

3. The holding of the Fifth Circuit in this case conflicts with the only other circuit court decision addressing the question whether state regulations relating to general trackside walkways are preempted by Section 434.[11] In *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 820 F.2d 1111 (1987) (*reprinted* Pet. App. 70a-71a), the Ninth Circuit held that state walkway regulations were not preempted under FRSA because the Secretary had not adopted regulations covering that subject matter. The conflict between the Fifth and Ninth Circuits does not, however, presently warrant this Court's review.[12]

The Ninth Circuit's decision in *Southern Pacific* was a per curiam affirmance of the district court's analysis in *Southern Pacific Transportation* v. *Public Utilities Comm'n*, 647 F. Supp. 1220 (N.D. Cal. 1986) (*reprinted*, Pet. App. 56a-69a). The district court in that case concluded that

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[11] The Sixth Circuit's decision in *Norfolk & Western R.R.* v. *Public Utilities Commission*, *supra*, concerns a related, but distinct issue—the validity of state laws mandating walkways along railroad bridges. With respect to that precise issue, it is plain that FRA has specifically determined that bridge walkways are inappropriate. See 57 Fed. Reg. 28,116 (1992).

[12] A number of district and state courts have also had occasion to address whether Section 434 preempts state regulations relating to walkways adjacent to railroad tracks. See, *e.g.*, *Norfolk & Western R.R.* v. *Burns*, 587 F. Supp. 161 (E.D. Mich. 1984) (FRSA preempted Michigan Occupational Safety and Health Act regulation of tracks, roadbeds and walkways in rail yards); *Black* v. *Seaboard System R.R.*, 487 N.E.2d 468 (Ind. Ct. App. 1986) (FRSA preempted Indiana Public Service Commission rules relating to the condition of walkways along roadbeds); *Illinois Central Gulf Ry.* v. *Tennessee Public Services Comm'n*, 736 S.W.2d 112 (Tenn. Ct. App. 1987) (state walkway regulations not preempted by FRSA). See also Pet. App. 45a n.11 (gathering cases).

"[s]tate and federal regulations * * * cannot be held to cover the same subject matter unless they address the same safety concerns." Pet. App. 63a. Applying that analysis, the court held that state walkway regulations were directed at a different safety objective than FRA roadbed regulations, and were therefore not preempted. *Ibid.*

The *Southern Pacific* analysis is flawed. In our view, it cannot be squared with this Court's recent rejection of "the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state * * * in passing its law had some purpose in mind other than one of frustration." *Gade*, 112 S. Ct. at 2387 (quoting *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971)). See also *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963). The better view, as we have expressed, is that Section 434 preemption depends on the scope of the Secretary's regulations and the Secretary's view of what subject those regulations cover.

In any event, it is unclear that the Ninth Circuit would adhere to its cursory per curiam affirmance in *Southern Pacific*. First, that court did not have the benefit of the Fifth Circuit's searching legal analysis in this case, or the district court's factual findings concerning the relationship between state walkway and federal roadbed regulations. Moreover, it is likely that this Court's analysis in *CSX* will effectively require the Ninth Circuit (as well as other courts of appeals) to reconsider prior precedents construing the preemptive scope of Section 434. It accordingly does not appear to be necessary to grant plenary review in this case in order to resolve the conflict between the Fifth and Ninth Circuits.

CONCLUSION

The petition should be held and disposed of as appropriate in light of the decision in *CSX Transportation, Inc.* v. *Easterwood*, Nos. 91-790 & 91-1206.

Respectfully submitted.

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APPENDIX

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

400 Seventh St., S.W.
Washington, D.C. 20590

Oct. 17, 1986

Mr. James E. Nugent, Commissioner
Mr. Mack Wallace, Commissioner
Mr. Clark Jobe, Commissioner
Railroad Commission of Texas
P.O. Drawer 12967
Austin, Texas 78711

Dear Sirs:

I understand that the Railroad Commission of Texas has recently adopted several safety rules affecting the operations of railroads operating within the State of Texas, and that these rules are now the subject of litigation in the United States District Court for the Western District of Texas. On behalf of the Federal Railroad Administration, I have previously stated my opinion as FRA Chief Counsel on the subject of state regulation of railroad walkways. Accordingly, I believe it may be helpful to furnish you and the court with those views as they relate to the walkway requirement stated in section 5.619 of the Texas Administrative Code. I have had an opportunity to study your examiner's memorandum and recommendation as well as the comments filed by the Texas Class I Railroads.

For the reasons stated below, it is my opinion as Chief Counsel that the rule adopted as section 5.619 has been preempted and is thus without force and effect.

The Federal Railroad Safety Act of 1970 (Safety Act) provides in part: "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be national uniform to the extent practicable." 45 U.S.C. § 434. Courts have consistently acknowledged Congress' intent to establish national uniform control of railroad safety and to preempt regulation in this field. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Chicago Transit Auth. v. Flohr*, 570 F.2d 1305 (7th Cir. 1977); *Southern Pacific Transp. Co. v. United States*, 462 F. Supp. 1193 (E.D. Ca. 1978); *Atchison, Topeka and Santa Fe Ry. Co. v. Illinois Commerce Comm.*, 453 F. Supp. 920 (N.D. Ill. 1977). In fact, some courts have characterized the Safety Act as evincing a "total preemptive" intent. *National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Santa Fe*, 453 F. Supp. at 925.

In *Santa Fe*, the court warned against interpreting the Safety Act in a way that would frustrate its stated purpose of establishing uniform standards. The court found that the legislative history of the Act clearly articulates this purpose:

> [The railroad industry] has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id at 925, quoting House Report, 1970 U.S. Code Cong. & Admin. News, 91st Cong., 2d Sess. pp. 4104, 4110-11.

Consistent with the statutory mandate, FRA has previously expressed the agency's views on the scope of its regulatory purview:

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.

Policy Statement and Termination of Rulemaking on Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,586 (1978).

However, in the recognition that some state regulation of rail safety may be necessary, the Safety Act sets out a framework for determining when State requirements are preempted:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard *covering the subject matter* of such State requirement. A State may adopt or continue in force an *additional or more stringent* law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an *essentially local safety hazard*, and *when not incompatible* with any Federal law, rule, regulation, order, or standard, and *when not creating an undue burden* on interstate commerce.

45 U.S.C. § 434 (emphasis added).

This framework establishes two levels of inquiry. First, upon identification of the "subject matter" of the chal-

lenged state rule, the question is whether FRA has taken affirmative or negative action "covering" that "subject matter," *i.e.*, has FRA occupied it in whole or in part either (i) by rule, regulation, etc., or (ii) by an agency decision, such as a policy statement or termination of a proposed rulemaking proceeding, that for a particular subject matter no rule or restriction is appropriate or necessary as a matter of rail safety (or a combination of affirmative and negative actions addressing a given subject matter). *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). If not, there is no further inquiry, and the State rule stands "until such time" as FRA does so act to "cover[] the subject matter".

If so, however, the inquiry passes to the second level: the state rule (by hypothesis "an additional or more stringent" one) is enforceable *only if* it satisfies a three-prong test: (i) necessary to eliminate or reduce an essentially local safety hazard; (ii) not incompatible with any Federal rule; and (iii) not an undue burden on interstate commerce. The legislative history of section 434 makes clear that the first prong does not contemplate statewide laws or rules; a "local safety hazard" is to be read as one peculiar to a particular locality. H.R. Rep. 1194, 91st Cong., 2d Sess. (1970).

In reality, the outcome under section 434 will be determined largely by whether the FRA rule has "cover[ed] the subject matter" of the state rule, for if it has the three-prong test establishes a very exacting standard for the State rule to satisfy. Indeed, while the statute contemplates some State regulation, the courts have construed the section 434 framework narrowly, giving broad support to the Safety Act's mandate for national uniformity. *National Association of Regulatory Commissioners*, 542 F.2d at 14; *Donelon*, 474 F.2d at 1112; *Santa Fe*, 453 F. Supp. at 926. These holdings are consistent with the court's commonly narrow construction of such saving

clauses in order to give full expression to the Congressional purpose. *Cippollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D. N. J. 1984), citing *People of the State of Illinois v. City of Milwaukee*, 731 F. 2d 403, 413-14 (7th Cir. 1984), *American Progressive Life and Health Insurance Co. of New York v. Corcoran*, 715 F.2d 784, 786-87, (2d Cir. 1983); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1274-81 (5th Cir. 1978).

As I understand it, section 5.619 prescribes, with certain exceptions, a uniform statewide standard of six-foot minimum continuous walkways along both sides of tracks in yards and places where switching is performed.

FRA has several rules covering this subject matter. FRA has adopted general regulations (49 C.F.R. Part 214) that prescribe minimum safety requirements for railroad track subject to Federal jurisdiction, which have been held to preempt the entire field of track safety standards. *Santa Fe*, 453 F. Supp. at 925. The FRA track standards also prescribe minimum requirements for areas "immediately adjacent" to the roadbed. 49 C.F.R. Part 213, Subpart B. This provision requires the control of vegetation adjacent to roadbed that might interfere with employees performing normal trackside duties. 49 C.F.R. § 213.37. Moreover, FRA requires the correction of defective walkways on signal structures under the authority of the Signal Inspection Act. 49 U.S.C. § 26(e).

In addition to these rules, FRA has expressed its policy that other government entities are precluded from exercising jurisdiction with respect to areas such as walkways beside the tracks in yards or along the right-of-way:

> These are areas which are so much a part of the operating environment that they must be regulated by the agency with the primary responsibility for railroad safety. Therefore, FRA will determine the need for and feasibility of general standards to

> address individual hazards relating to such surfaces, keeping in mind the requirement of proper clearances and the familiarity of employees with existing industry designs.

Policy Statement of Termination of Rulemaking on Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10587 (1978).

FRA has also expressed its intent to use its Safety Act emergency power, in addition to its authority under the Signal Inspection Act and the Track Safety Standards, to achieve the correction of walkway-related problems. *Id.*

Thus, although FRA has not issued a specific rule on walkway location and width, in my opinion FRA has acted so as to occupy the subject matter addressed by the Commission's rule, *i.e.*, trackside walkways, a matter subsumed by the larger subject of areas immediately adjacent to the roadbed.

Our view of FRA's preemption of this area has been confirmed in court. In *Norfolk and Western Ry. Co. v. Burns*, 587 F. Supp. 161 (E.D. Mich. 1984), the court cited and relied on FRA's 1978 policy statement, quoted above, to find preemption under section 434. Given the relationship of the walkways to the railbed and the general construction of the roadbed and the rail system itself, the court reasoned that walkways are a part of the track structure and rail system and that regulation of them is accordingly preempted by FRA. The court, of course, recognized the State's ability to address local safety hazards. *Id.* at 170. A rule applicable on a statewide basis does *not* address a *local* safety hazard. *See also, Black v. Public Service Comm. of Indiana*, 487 N.E. 2d 468 (Ind. Ct. App. 1988).

Moreover, FRA has previously considered a walkway rule. On November 15, 1976, FRA published an advance notice of proposed rulemaking, stating that it was studying the need for a Federal regulation requiring the con-

struction of walkways on railroad bridges, trestles, and similar structures. (As I understand it, section 5.619 regulates walkways on a statewide basis, but does not apply generally outside yards). On April 26, 1977, FRA terminated this proceeding because it had concluded that the significant cost of constructing such walkways could not be justified by any definite or measureable improvement to railroad employee safety. FRA also found that such walkways could present added hazards because of increased trespassing, and that requiring their installation could cause overall railroad safety to decrease because it would divert resources from other more beneficial maintenance and improvement projects. FRA found that if an employee safety problem does exist because of lack of walkways in a particular area or on a particular structure, regulation by a state agency addressing a hazard peculiar to a given locality is the "more appropriate response." 42 Fed. Reg. 22,184 (1977). FRA's consideration of walkways in that proceeding, together with its regulation of trackside areas, demonstrates conclusively that FRA has addressed the subject matter and occupied it.

Accordingly, section 5.619 is preempted by FRA's actions in this area unless the State can satisfy the three-prong test of section 434. In this case, however, I believe it would be most difficult for the State to meet its burden of proof under that test. Even if the State could establish that section 5.619 was compatible with Federal regulations and not a burden on interstate commerce, I doubt that the State could show that this order was "*necessary* to eliminate or reduce an *essentially local* safety hazard," *i.e.*, one limited to a particular structure. To the contrary, section 5.619 by its own terms applies statewide. *See National Association of Regulatory Utility Commissioners*, 542 F.2d at 14-15; *Santa Fe*, 453 F. Supp. at 926.

In conclusion, it is my opinion as Chief Counsel that section 5.619 has been preempted, since the subject matter

has been addressed by FRA and the broad nature of the order does not comport with the Safety Act criteria for additional State requirements.

Very truly yours,

/s/ John M. Mason

JOHN M. MASON
Chief Counsel

cc: United States District Court for the Western District of Texas (Austin Division), No. A-86-CA-406

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